

Instructions for Employment Claims Under the Americans With Disabilities Act

Numbering of ADA Instructions

9.0 ADA Employment Claims – Introductory Instruction

9.1 Elements of an ADA Claim

9.1.1 Disparate Treatment — Mixed-Motive

9.1.2 Disparate Treatment — Pretext

9.1.3 Reasonable Accommodation

9.1.4 Harassment — Hostile Work Environment — Tangible Employment Action

9.1.5 Harassment — Hostile Work Environment — No Tangible Employment Action

9.1.6 Disparate Impact

9.1.7 Retaliation

9.2 ADA Definitions

9.2.1 Disability

9.2.2 Qualified Individual

9.2.3 Hostile or Abusive Work Environment

9.2.4 Constructive Discharge

9.3 ADA Defenses

9.3.1 Direct Threat

9.4 ADA Damages

| | |
|----|---|
| 1 | |
| 2 | 9.4.1 Compensatory Damages — General Instruction |
| 3 | |
| 4 | 9.4.2 Punitive Damages |
| 5 | |
| 6 | 9.4.3 Back Pay — For Advisory or Stipulated Jury |
| 7 | |
| 8 | 9.4.4 Front Pay — For Advisory or Stipulated Jury |
| 9 | |
| 10 | 9.4.5 Nominal Damages |

9.0 ADA Employment Claims—Introductory Instruction

Model

In this case the Plaintiff _____ makes a claim based on a federal law known as the Americans with Disabilities Act, which will be referred to in these instructions as the ADA.

Under the ADA, an employer may not deprive a person with a disability of an employment opportunity because of that disability, if that person is able, with reasonable accommodation if necessary, to perform the essential functions of the job. Terms such as “disability”, “qualified individual” and “reasonable accommodations” are defined by the ADA and I will instruct you on the meaning of those terms.

[Plaintiff’s] claim under the ADA is that [he/she] was [describe the employment action at issue] by the defendant _____ because of [plaintiff’s] [describe alleged disability].

[Defendant] denies [plaintiff’s] claims. Further, [defendant] asserts that [describe any affirmative defenses].

As you listen to these instructions, please keep in mind that many of the terms I will use, and you will need to apply, have a special meaning under the ADA. So please remember to consider the specific definitions I give you, rather than using your own opinion of what these terms mean.

Comment

Referring to the parties by their names, rather than solely as “Plaintiff” and “Defendant,” can improve jurors’ comprehension. In these instructions, bracketed references to “[plaintiff]” or “[defendant]” indicate places where the name of the party should be inserted.

“Congress enacted the ADA in 1990 in an effort to prevent otherwise qualified individuals from being discriminated against in employment based on a disability.” *Gaul v. Lucent Technologies Inc.*, 134 F.3d 576, 579 (3d Cir. 1998). The ADA provides that “[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112(a). A “qualified individual” is “an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” 42 U.S.C. § 12111(8).¹ An entity discriminates against an individual on the basis of disability when, inter alia,

¹ Section 12111(8) continues: “For the purposes of this subchapter, consideration shall

1 it does “not mak[e] reasonable accommodations to the known physical or mental limitations of an
2 otherwise qualified individual with a disability who is an applicant or employee, unless such covered
3 entity can demonstrate that the accommodation would impose an undue hardship on the operation of
4 the business of [the] entity.” 42 U.S.C. § 12112(b)(5)(A). Reasonable accommodations may
5 include, inter alia, “job restructuring, part-time or modified work schedules, reassignment to a vacant
6 position, acquisition or modification of equipment or devices, appropriate adjustment or
7 modifications of examinations, training materials or policies, the provision of qualified readers or
8 interpreters, and other similar accommodations for individuals with disabilities.” 42 U.S.C. §
9 12111(9).

10
11 “In order to make out a prima facie case of disability discrimination under the ADA, [the
12 plaintiff] must establish that she (1) has a ‘disability,’ (2) is a ‘qualified individual,’ and (3) has
13 suffered an adverse employment action because of that disability.” *Turner v. Hershey Chocolate*
14 *U.S.*, 440 F.3d 604, 611 (3d Cir. 2006).

15
16 The EEOC has provided interpretive guidance on the test for determining whether a person is
17 a qualified individual. That guidance was drafted prior to the 2008 amendments to the ADA, *see*
18 ADA Amendments Act of 2008, Pub. L. No. 110-325, Sept. 25, 2008, 122 Stat. 3553, and it
19 therefore uses outdated terminology (“qualified individuals with disabilities”), but the two-step
20 framework set forth in the guidance may still be pertinent. “The first step is to determine if the
21 individual satisfies the prerequisites for the position, such as possessing the appropriate educational
22 background, employment experience, skills, licenses, etc.The second step is to determine whether
23 or not the individual can perform the essential functions of the position held or desired, with or
24 without reasonable accommodation. The determination of whether an individual with a disability
25 is qualified is to be made at the time of the employment decision.” 29 C.F.R. Pt. 1630, App.

26 27 *The ADA, Public Accommodations and Public Services*

28
29 Title I of the ADA covers claims made by employees or applicants for disparate treatment,
30 failure to make reasonable accommodations, and retaliation against protected activity. Titles II and
31 III cover public accommodations and public services for persons with disabilities. These instructions
32 are intended to cover only those cases arising under the employment provisions of the ADA. For a
33 discussion and application of the standards governing actions under Titles II and III of the ADA, *see*
34 *Bowers v. National Collegiate Athletic Assoc.*, 475 F.3d 524 (3d Cir. 2007).

35 36 *The Rehabilitation Act*

37
38 Federal employers and employers who receive federal funding are subject to the
39 Rehabilitation Act, which is a precursor of the ADA. 29 U.S.C. § 701 et seq. The substantive

be given to the employer's judgment as to what functions of a job are essential, and if an
employer has prepared a written description before advertising or interviewing applicants for the
job, this description shall be considered evidence of the essential functions of the job.”

standards for a claim under the Rehabilitation Act are in many respects identical to those governing a claim under the ADA. *See, e.g., Wishkin v. Potter*, 476 F.3d 180, 184 (3d Cir. 2007) (“The Rehabilitation Act expressly makes the standards set forth in the 1990 Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., applicable to federal employers and to employers receiving federal funding.”); *Bragdon v. Abbott*, 524 U.S. 624 (1998) (determination of “disability” is the same under the ADA and the Rehabilitation Act); *Conneen v. MBNA America Bank, N.A.*, 334 F.3d 318, 330 (3d Cir. 2003) (Rehabilitation Act cases apply “with equal force” to the ADA); *Deane v. Pocono Medical Center*, 142 F.3d 138 (3d Cir. 1998) (en banc) (analysis of “reasonable accommodation” is the same under the ADA and the Rehabilitation Act). These ADA instructions can therefore be applied, and modified if necessary, to a claim brought under the Rehabilitation Act.

The ADA’s association provision

Chapter 9 does not include an instruction specifically dealing with claims under 42 U.S.C. § 12112(b)(4), which defines “discriminat[ion] against a qualified individual on the basis of disability” to include “excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association.” For a discussion of such claims, see *Erdman v. Nationwide Ins. Co.*, 582 F.3d 500, 510-11 (3d Cir. 2009).

Religious Entities; Ministerial Exception

Religious entities sued under Subchapter I of the ADA may assert two statutory defenses set out in 42 U.S.C. § 12113(d). But retaliation claims under 42 U.S.C. § 12203(a) arise under Subchapter IV of the ADA, which does not contain such defenses.

Apart from those statutory defenses, the First Amendment’s religion clauses give rise to an affirmative defense that “bar[s] the government from interfering with the decision of a religious group to fire one of its ministers.” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 702, 709 n.4 (2012) (applying this defense to an ADA retaliation claim). For further discussion of the ministerial exception, see Comment 5.0.

9.1.1 Elements of an ADA Claim— Disparate Treatment — Mixed-Motive

Model

In this case [plaintiff] is alleging that [defendant] [describe alleged disparate treatment] [plaintiff]. In order for [plaintiff] to recover on this discrimination claim against [defendant], [plaintiff] must prove that [defendant] intentionally discriminated against [plaintiff]. This means that [plaintiff] must prove that [his/her] [disability] was a motivating factor in [defendant's] decision [describe action] [plaintiff].

To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of the evidence:

First: [Plaintiff] has a “disability” within the meaning of the ADA.

Second: [Plaintiff] is a “qualified individual” able to perform the essential functions of [specify the job or position sought].

Third: [Plaintiff's] [disability] was a motivating factor in [defendant's] decision [describe action] [plaintiff].

Although [plaintiff] must prove that [defendant] acted with the intent to discriminate on the basis of a disability, [plaintiff] is not required to prove that [defendant] acted with the particular intent to violate [plaintiff's] federal rights under the ADA.

In showing that [plaintiff's] [disability] was a motivating factor for [defendant's] action, [plaintiff] is not required to prove that [his/her] [disability] was the sole motivation or even the primary motivation for [defendant's] decision. [Plaintiff] need only prove that [the disability] played a motivating part in [defendant's] decision even though other factors may also have motivated [defendant].

As used in this instruction, [plaintiff's] [disability] was a “motivating factor” if [his/her] [disability] played a part [or played a role] in [defendant's] decision to [state adverse employment action] [plaintiff].

[I will now provide you with more explicit instructions on the following statutory terms:

1. “Disability.” — Instruction 9.2.1

2. “Qualified” — See Instruction 9.2.2]

1 **[For use where defendant sets forth a “same decision” affirmative defense:²**
2

3 If you find that [defendant's] treatment of [plaintiff] was motivated by both discriminatory
4 and lawful reasons, you must decide whether [plaintiff] is entitled to damages. [Plaintiff] is not
5 entitled to damages if [defendant] proves by a preponderance of the evidence that [defendant] would
6 have treated [plaintiff] the same even if [plaintiff's] [disability] had played no role in the
7 employment decision.]
8
9

10 **Comment**
11

12 The Third Circuit has held that disparate treatment discrimination cases under the ADA are
13 governed by the same standards applicable to Title VII actions. *See, e.g., Shaner v. Synthes*, 204
14 F.3d 494, 500 (3d Cir. 2000); *Walton v. Mental Health Ass'n of Southeastern Pa.*, 168 F.3d 661, 667-
15 68 (3d Cir. 1999); *Newman v. GHS Osteopathic, Inc.*, 60 F.3d 153, 156-58 (3d Cir. 1995). *See also*
16 *Raytheon Co. v. Hernandez*, 540 U.S. 44, 50, n.3 (2003) (noting that all of the courts of appeals have
17 applied the Title VII standards to disparate treatment cases under the ADA). These ADA instructions
18 accordingly follow the “mixed-motive”/ “pretext” delineation employed in Title VII actions.
19

20 In *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009), the Supreme Court rejected
21 the use of a mixed-motive framework for claims under the Age Discrimination in Employment Act
22 (ADEA). The *Gross* Court reasoned that it had never held that the mixed-motive framework set by
23 *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), applied to ADEA claims; that the ADEA's
24 reference to discrimination “because of” age indicated that but-for causation is the appropriate test;
25 and that this interpretation was bolstered by the fact that when Congress in 1991 provided the
26 statutory mixed-motive framework codified at 42 U.S.C. § 2000e-5(g)(2)(B), that provision was not
27 drafted so as to cover ADEA claims. The Committee has not attempted to determine what, if any,
28 implications *Gross* has for ADA claims, but the Committee suggests that users of these instructions
29 should consider that question.
30

31 The distinction between “mixed-motive” cases and “pretext” cases is generally determined by
32 whether the plaintiff produces direct rather than circumstantial evidence of discrimination. If the
33 plaintiff produces direct evidence of discrimination, this is sufficient to show that the defendant's
34 activity was motivated at least in part by discriminatory animus, and therefore a “mixed-motive”
35 instruction is given. If the evidence of discrimination is only circumstantial, then defendant can argue
36 that there was no discriminatory animus at all, and that its employment decision can be explained
37 completely by a non-discriminatory motive; it is then for the plaintiff to show that the alleged non-
38 discriminatory motive is a pretext, and accordingly Instruction 9.1.2 should be given. *See generally*
39 *Fakete v. Aetna, Inc.*, 308 F.3d 335 (3d Cir. 2002) (using “direct evidence” to describe “mixed-

² The Committee uses the term “affirmative defense” to refer to the burden of proof, and takes no position on the burden of pleading the same-decision defense.

1 motive” cases and noting that pretext cases arise when the plaintiff presents only indirect or
2 circumstantial evidence of discrimination).³

3
4 The Third Circuit explained the applicability of a “mixed-motive” instruction in ADA cases
5 in *Buchsbaum v. University Physicians Plan*, 55 Fed Appx. 40, 43 (3d Cir. 2002).⁴ It noted that the
6 “typical” case is considered under the *McDonnell-Douglas* burden-shifting analysis, but stated that

7
8 the “mixed motive” analysis of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), may be
9 applied instead if the plaintiff has produced “direct evidence” of the employer’s
10 discriminatory animus. Under a *Price-Waterhouse* “mixed motive” analysis, where there is
11 strong evidence of an employer’s discriminatory animus, the burden of proof shifts from the
12 plaintiff to the employer to prove that its motives for the employment action were “mixed”
13 that is, while some motives were discriminatory, the employer had legitimate non-
14 discriminatory motives as well which would have resulted in the adverse employment action.
15 Thus, we have described the “direct evidence” that the employee must produce . . . to warrant
16 a “mixed motives” analysis as “so revealing of discriminatory animus that it is not necessary
17 to rely on any presumption from the prima facie case to shift the burden of production. . . .
18 The risk of non-persuasion [is] shifted to the defendant who . . . must persuade the factfinder
19 that . . . it would have made the same employment decision regardless of its discriminatory
20 animus.” *Armbruster v. Unisys Corp.*, 32 F.3d 768, 778 (3d Cir. 1994). Such direct evidence
21 “requires ‘conduct or statements by persons involved in the decisionmaking process that may
22 be viewed as directly reflecting the alleged discriminatory attitude.’” *Starceski v.*
23 *Westinghouse Electric Corp.*, 54 F.3d 1089, 1096 (3d Cir. 1995) (quoting *Griffiths v. CIGNA*
24 *Corp.*, 988 F.2d 457, 470 (3d Cir. 1993)).

25 26 *Statutory Definitions*

27
28 The ADA employs complicated and sometimes counterintuitive statutory definitions for
29 many of the important terms that govern a disparate treatment action. Instructions for these statutory
30 definitions are set forth at 9.2.1-2. They are not included in the body of the “mixed-motives”

³ *Fakete* was an ADEA case and has been overruled by *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009). However, *Fakete*’s discussion of the distinction between mixed-motive and pretext cases may still be instructive for types of claims to which *Price Waterhouse* burden-shifting may apply. Cf. Comment 5.1.1 (discussing treatment of analogous question concerning statutory burden-shifting framework in *Desert Palace Inc. v. Costa*, 539 U.S. 90 (2003)).

⁴ The portion of *Buchsbaum* quoted in the text cites *Armbruster* and *Starceski* – two ADEA cases. To the extent that *Armbruster* and *Starceski* approved the use of *Price Waterhouse* burden-shifting for ADEA cases, they have been overruled by *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009). But *Buchsbaum*’s discussion may still be instructive for types of claims to which *Price Waterhouse* burden-shifting may apply.

1 instruction because not all of them will ordinarily be in dispute in a particular case, and including all
2 of them would unduly complicate the basic instruction.

3 4 *“Same Decision” Instruction*

5
6 Under Title VII, if the plaintiff proves intentional discrimination in a “mixed-motives” case,
7 the defendant can still avoid liability for money damages by demonstrating by a preponderance of the
8 evidence that the same decision would have been made even in the absence of the impermissible
9 motivating factor. If the defendant establishes this defense, the plaintiff is then entitled only to
10 declaratory and injunctive relief, attorney’s fees and costs. Orders of reinstatement, as well as the
11 substitutes of back and front pay, are prohibited if a same decision defense is proven. 42 U.S.C.
12 §2000e-(5)(g)(2)(B). The ADA explicitly relies on the enforcement tools and remedies described in
13 42 U.S.C. §2000e-(5). See 42 U.S.C. § 12117(a). Therefore, a plaintiff in a “mixed-motives” case
14 under the ADA is not entitled to damages if the defendant proves that the adverse employment action
15 would have been made even if disability had not been a motivating factor. But Instruction 9.1.1 is
16 premised on the assumption that the “same decision” defense is not a complete defense as it is in
17 cases where the *Price Waterhouse* burden-shifting framework applies. Compare, e.g., Instruction
18 and Comment 6.1.1 (discussing the use of the *Price Waterhouse* burden-shifting framework in
19 Section 1981 cases).

20 21 *Direct Threat*

22
23 The ADA provides a defense if the employment or accommodation of an otherwise qualified,
24 disabled individual would pose a “direct threat” to the individual or to others. The “direct threat”
25 affirmative defense is applicable both to disparate treatment claims and reasonable accommodation
26 claims. See *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002); *Buskirk v. Apollo Metals*, 307
27 F.3d 160, 168 (3d Cir. 2002). See 9.3.1 for an instruction on the “direct threat” affirmative defense.

28 29 *Animus of Employee Who Was Not the Ultimate Decisionmaker*

30
31 Construing a statute that explicitly referred to discrimination as “a motivating factor,” the
32 Supreme Court ruled that “if a supervisor performs an act motivated by antimilitary animus that is
33 *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate
34 cause of the ultimate employment action, then the employer is liable under [the Uniformed Services
35 Employment and Reemployment Rights Act of 1994 (USERRA)]” even if the ultimate employment
36 decision is taken by one other than the supervisor with the animus. *Staub v. Proctor Hosp.*, 131 S.
37 Ct. 1186, 1194 (2011) (footnotes omitted). Like the USERRA, 42 U.S.C. § 2000e-5(g)(2)(B) refers
38 to discrimination as a “motivating factor.” Assuming that Section 2000e-5(g)(2)(B) applies to
39 mixed-motive claims under the ADA, there may be some reason to think that *Staub*’s analysis might
40 extend to ADA mixed-motive claims. On the other hand, the argument for extending *Staub* to ADA
41 mixed-motive claims is not as strong as the argument for extending *Staub* to Title VII mixed-motive
42 claims (see Comment 5.1.1). The main difference is that Section 2000e-5(g)(2)(B) refers to
43 “claim[s] in which an individual proves a violation under section 2000e-2(m) of this title,” and

1 Section 2000e-2(m) does not list disability discrimination among the types of violations that it bars.
2 Section 2000e-2(m)'s "motivating factor" language does not apply to ADA claims – and it was
3 Section 2000e-2(m) that the *Staub* Court noted as containing language similar to the USERRA
4 language that it was construing. *See Staub*, 131 S. Ct. at 1191. Thus, it is unclear whether the ruling
5 in *Staub* would extend to mixed-motive claims under the ADA.

9.1.2 Elements of an ADA Claim – Disparate Treatment — Pretext

Model

In this case [plaintiff] is alleging that [defendant] [describe alleged disparate treatment] [plaintiff]. In order for [plaintiff] to recover on this discrimination claim against [defendant], [plaintiff] must prove that [defendant] intentionally discriminated against [plaintiff]. This means that [plaintiff] must prove that [his/her] [disability] was a determinative factor in [defendant's] decision to [describe action] [plaintiff].

To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of the evidence:

First: [Plaintiff] has a “disability” within the meaning of the ADA.

Second: [Plaintiff] is a “qualified individual” able to perform the essential functions of [specify the job or position sought].

Third: [Plaintiff's] disability was a determinative factor in [defendant's] decision [describe action] [plaintiff].

[I will now provide you with more explicit instructions on the following statutory terms:

1. “Disability.” — Instruction 9.2.1

2. “Qualified” — See Instruction 9.2.2]

Although [plaintiff] must prove that [defendant] acted with the intent to discriminate on the basis of a disability, [plaintiff] is not required to prove that [defendant] acted with the particular intent to violate [plaintiff's] federal rights under the ADA. Moreover, [plaintiff] is not required to produce direct evidence of intent, such as statements admitting discrimination. Intentional discrimination may be inferred from the existence of other facts.

[For example, you have been shown statistics in this case. Statistics are one form of evidence from which you may find, but are not required to find, that a defendant intentionally discriminated against a plaintiff. You should evaluate statistical evidence along with all the other evidence received in the case in deciding whether [defendant] intentionally discriminated against [plaintiff]].

[Defendant] has given a nondiscriminatory reason for its [describe defendant's action]. If you disbelieve [defendant's] explanations for its conduct, then you may, but need not, find that [plaintiff] has proved intentional discrimination. In determining whether [defendant's] stated reason for its actions was a pretext, or excuse, for discrimination, you may not question [defendant's] business judgment. You cannot find intentional discrimination simply because you disagree with the business

1 judgment of [defendant] or believe it is harsh or unreasonable. You are not to consider [defendant's]
2 wisdom. However, you may consider whether [defendant's] reason is merely a cover-up for
3 discrimination.

4
5 Ultimately, you must decide whether [plaintiff] has proven that [his/her] [disability] was a
6 determinative factor in [defendant's employment decision.] "Determinative factor" means that if not
7 for [plaintiff 's] [disability], the [adverse employment action] would not have occurred.
8

9 10 **Comment**

11
12 This instruction is to be used when the plaintiff's proof of discrimination on the basis of a
13 disability is circumstantial rather than direct. The Third Circuit has held that disparate treatment
14 discrimination cases under the ADA are governed by the same standards applicable to Title VII
15 actions. *See, e.g., Shaner v. Synthes*, 204 F.3d 494, 500 (3d Cir. 2000) ("We have indicated that the
16 burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), applies to
17 ADA disparate treatment and retaliation claims. *See Walton v. Mental Health Ass'n of Southeastern*
18 *Pa.*, 168 F.3d 661, 667-68 (3d Cir. 1999); *Newman v. GHS Osteopathic, Inc.*, 60 F.3d 153, 156-58
19 (3d Cir. 1995)"). *See also Raytheon Co. v. Hernandez*, 540 U.S. 44, 50, n.3 (2003) (noting that all of
20 the courts of appeals have applied the Title VII standards to disparate treatment cases under the
21 ADA). Accordingly this instruction tracks the instruction for "pretext" cases in Title VII actions. *See*
22 *Instruction 5.1.2.*
23

24 The proposed instruction does not charge the jury on the complex burden-shifting formula
25 established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Dept. of*
26 *Community Affairs v. Burdine*, 450 U.S. 248 (1981). Under the *McDonnell Douglas* formula a
27 plaintiff who proves a prima facie case of discriminatory treatment raises a presumption of
28 intentional discrimination. The defendant then has the burden of production, not persuasion, to rebut
29 the presumption of discrimination by articulating a nondiscriminatory reason for its actions. If the
30 defendant does articulate a nondiscriminatory reason, the plaintiff must prove intentional
31 discrimination by demonstrating that the defendant's proffered reason was a pretext, hiding the real
32 discriminatory motive.
33

34 In *Smith v. Borough of Wilkesburg*, 147 F.3d 272, 280 (3d Cir. 1998), the Third Circuit
35 declared that "the jurors must be instructed that they are entitled to infer, but need not, that the
36 plaintiff's ultimate burden of demonstrating intentional discrimination by a preponderance of the
37 evidence can be met if they find that the facts needed to make up the prima facie case have been
38 established and they disbelieve the employer's explanation for its decision." The court also stated,
39 however, that "[t]his does not mean that the instruction should include the technical aspects of the
40 *McDonnell Douglas* burden shifting, a charge reviewed as unduly confusing and irrelevant for a
41 jury." The court concluded as follows:
42

43 Without a charge on pretext, the course of the jury's deliberations will depend on whether the

1 jurors are smart enough or intuitive enough to realize that inferences of discrimination may
2 be drawn from the evidence establishing plaintiff's prima facie case and the pretextual nature
3 of the employer's proffered reasons for its actions. It does not denigrate the intelligence of
4 our jurors to suggest that they need some instruction in the permissibility of drawing that
5 inference.

6
7 *See also Pivrotto v. Innovative Systems, Inc.*, 191 F.3d 344, 347 n.1 (3d Cir. 1999), where
8 the Third Circuit gave extensive guidance on the place of the *McDonnell Douglas* test in jury
9 instructions:

10
11 The short of it is that judges should remember that their audience is composed of jurors and
12 not law students. Instructions that explain the subtleties of the *McDonnell Douglas*
13 framework are generally inappropriate when jurors are being asked to determine whether
14 intentional discrimination has occurred. To be sure, a jury instruction that contains elements
15 of the *McDonnell Douglas* framework may sometimes be required. For example, it has been
16 suggested that "in the rare case when the employer has not articulated a legitimate
17 nondiscriminatory reason, the jury must decide any disputed elements of the prima facie case
18 and is instructed to render a verdict for the plaintiff if those elements are proved." *Ryther* [*v.*
19 *KARE 11*], 108 F.3d at 849 n.14 (Loken, J., for majority of en banc court). But though
20 elements of the framework may comprise part of the instruction, judges should present them
21 in a manner that is free of legalistic jargon. In most cases, of course, determinations
22 concerning a prima facie case will remain the exclusive domain of the trial judge.

23
24 On proof of intentional discrimination, *see Sheridan v. E.I. DuPont de Nemours and Co.*, 100
25 F.3d 1061, 1066-1067 (3d Cir. 1996) ("[T]he elements of the prima facie case and disbelief of the
26 defendant's proffered reasons are the threshold findings, beyond which the jury is permitted, but not
27 required, to draw an inference leading it to conclude that there was intentional discrimination."). On
28 pretext, *see Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994) (pretext may be shown by "such
29 weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the [defendant's]
30 proffered legitimate reasons for its action that a reasonable [person] could rationally find them
31 'unworthy of credence,' and hence infer 'that the [defendant] did not act for [the asserted] non-
32 discriminatory reasons").

33 34 *Business Judgment*

35
36 On the "business judgment" portion of the instruction, *see Billet v. CIGNA Corp.*, 940 F.2d
37 812, 825 (3d Cir. 1991), where the court stated that "[b]arring discrimination, a company has the right
38 to make business judgments on employee status, particularly when the decision involves subjective
39 factors deemed essential to certain positions." The *Billet* court noted that "[a] plaintiff has the
40 burden of casting doubt on an employer's articulated reasons for an employment decision. Without
41 some evidence to cast this doubt, this Court will not interfere in an otherwise valid management
42 decision." The *Billet* court cited favorably the First Circuit's decision in *Loeb v. Textron, Inc.*, 600
43 F.2d 1003, 1012 n. 6 (1st Cir. 1979), where the court stated that "[w]hile an employer's judgment or

1 course of action may seem poor or erroneous to outsiders, the relevant question is simply whether the
2 given reason was a pretext for illegal discrimination."
3

4 *Determinative Factor* 5

6 The reference in the instruction to a “determinative factor” is taken from *Watson v. SEPTA*,
7 207 F.3d 207 (3d Cir. 2000) (holding that the appropriate term in pretext cases is “determinative
8 factor”, while the appropriate term in mixed-motive cases is “motivating factor”).

9 *Statutory Definitions*

10 The ADA employs complicated and sometimes counterintuitive statutory definitions for
11 many of the important terms that govern a disparate treatment action. Instructions for these statutory
12 definitions are set forth at 9.2.1-2. They are not included in the body of the “pretext” instruction
13 because not all of them will ordinarily be in dispute in a particular case, and including all of them
14 would unduly complicate the basic instruction.

15 *Direct Threat*

16 The ADA provides a defense if the employment or accommodation of an otherwise qualified,
17 disabled individual would pose a “direct threat” to the individual or to others. The “direct threat”
18 affirmative defense is applicable both to disparate treatment claims and reasonable accommodation
19 claims. See *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002); *Buskirk v. Apollo Metals*, 307
20 F.3d 160, 168 (3d Cir. 2002). See 9.3.1 for an instruction on the “direct threat” affirmative defense.

9.1.3 Elements of an ADA Claim — Reasonable Accommodation

Model

In this case [plaintiff] claims that [defendant] failed to provide a reasonable accommodation for [plaintiff]. The ADA provides that an employer may not deny employment opportunities to a qualified individual with a disability if that denial is based on the need of the employer to make reasonable accommodations to that individual's disability.

To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of the evidence:

First: [Plaintiff] has a "disability" within the meaning of the ADA.

Second: [Plaintiff] is a "qualified individual" able to perform the essential functions of [specify the job or position sought].

Third: [Defendant] was informed of the need for an accommodation of [plaintiff] due to a disability. [Note that there is no requirement that a request be made for a particular or specific accommodation; it is enough to satisfy this element that [defendant] was informed of [plaintiff's] basic need for an accommodation.]

Fourth: Providing [specify the accommodation(s) in dispute in the case] would have been reasonable, meaning that the costs of that accommodation would not have clearly exceeded its benefits.

Fifth: [Defendant] failed to provide [specify the accommodation(s) in dispute in the case] or any other reasonable accommodation.

[I will now provide you with more explicit instructions on the following statutory terms:

1. "Disability." — Instruction 9.2.1

2. "Qualified" — See Instruction 9.2.2]

[In deciding whether [plaintiff] was denied a reasonable accommodation, you must keep in mind that [defendant] is not obligated to provide a specific accommodation simply because it was requested by [plaintiff]. [Plaintiff] may not insist on a particular accommodation if another reasonable accommodation was offered. The question is whether [defendant] failed to provide any reasonable accommodation of [plaintiff's] disability.]

Under the ADA, a reasonable accommodation may include, but is not limited to, the following:

1
2 *[Set forth any of the following that are supported by the evidence:*

- 3
4 1. Modifying or adjusting a job application process to enable a qualified applicant with a
5 disability to be considered for the position;
6
7 2. Making existing facilities used by employees readily accessible to and usable by
8 [plaintiff];
9
10 3. Job restructuring;
11
12 4. Part-time or modified work schedule;
13
14 5. Reassignment to a vacant position for which [plaintiff] is qualified;
15
16 6. Acquisition or modifications of examinations, training manuals or policies;
17
18 7. Provision of qualified readers or interpreters; and
19
20 8. Other similar accommodations for individuals with [plaintiff's] disability.]

21
22 Note, however, that a "reasonable accommodation" does not require [defendant] to do any of
23 the following:

24
25 *[Set forth any of the following that are raised by the evidence:*

- 26
27 1. Change or eliminate any essential function of employment;
28
29 2. Shift any essential function of employment to other employees;
30
31 3. Create a new position for [plaintiff];
32
33 4. Promote [plaintiff];
34
35 5. Reduce productivity standards; or
36
37 6. Make an accommodation that conflicts with an established [seniority system] [other
38 neutral employment policy], unless [plaintiff] proves by a preponderance of the evidence that
39 "special circumstances" make an exception reasonable. For example, an exception might be
40 reasonable (and so "special circumstances" would exist) if exceptions were often made to the
41 policy. Another example might be where the policy already contains its own exceptions so
42 that, under the circumstances, one more exception is not significant.]
43

1 [On the other hand, [defendant's] accommodation is not "reasonable" under the ADA if
2 [plaintiff] was forced to change to a less favorable job and a reasonable accommodation could have
3 been made that would have allowed [plaintiff] to perform the essential functions of the job that
4 [he/she] already had. [Nor is an accommodation to a new position reasonable if [plaintiff] is not
5 qualified to perform the essential functions of that position.]]

6
7 **[For use where a jury question is raised about the interactive process:**

8
9 The intent of the ADA is that there be an interactive process between the employer and the
10 employee [applicant] in order to determine whether there is a reasonable accommodation that would
11 allow the employee [applicant] to perform the essential functions of a job. Both the employer and the
12 employee [applicant] must cooperate in this interactive process in good faith, once the employer has
13 been informed of the employee's [applicant's] request for a reasonable accommodation.

14
15 Neither party can win this case simply because the other did not cooperate in an interactive
16 process. But you may consider whether a party cooperated in this process in good faith in evaluating
17 the merit of that party's claim that a reasonable accommodation did or did not exist.]

18
19 **[For use where a previous accommodation has been provided:**

20
21 The fact that [defendant] may have offered certain accommodations to an employee or
22 employees in the past does not mean that the same accommodations must be forever extended to
23 [plaintiff] or that those accommodations are necessarily reasonable under the ADA. Otherwise, an
24 employer would be reluctant to offer benefits or concessions to disabled employees for fear that, by
25 once providing the benefit or concession, the employer would forever be required to provide that
26 accommodation. Thus, the fact that an accommodation that [plaintiff] argues for has been provided
27 by [defendant] in the past to [plaintiff], or to another disabled employee, might be relevant but does
28 not necessarily mean that the particular accommodation is a reasonable one in this case. Instead, you
29 must determine its reasonableness under all the evidence in the case.]

30
31 **[For use when there is a jury question on "undue hardship":**

32
33 If you find that [plaintiff] has proved the four elements I have described to you by a
34 preponderance of the evidence, then you must consider [defendant's] defense. [Defendant] contends
35 that providing an accommodation would cause an undue hardship on the operation of [defendant's]
36 business. Under the ADA, [defendant] does not need to accommodate [plaintiff] if it would cause an
37 "undue hardship" to its business. An "undue hardship" is something so costly or so disruptive that it
38 would fundamentally change the way that [defendant] runs its business.

39
40 Defendant must prove to you by a preponderance of the evidence that [describe
41 accommodation] would be an "undue hardship." In deciding this issue, you should consider the
42 following factors:

1 1. The nature and cost of the accommodation.

2
3 2. [Defendant's] overall financial resources. This might include the size of its business, the
4 number of people it employs, and the types of facilities it runs.

5
6 3. The financial resources of the facility where the accommodation would be made. This
7 might include the number of people who work there and the impact that the accommodation
8 would have on its operations and costs.

9
10 4. The way that [defendant] conducts its operations. This might include its workforce
11 structure; the location of its facility where the accommodation would be made compared to
12 [defendant's] other facilities; and the relationship between or among those facilities.

13
14 5. The impact of (specify accommodation) on the operation of the facility, including the
15 impact on the ability of other employees to perform their duties and the impact on the
16 facility's ability to conduct business.

17
18 *[List any other factors supported by the evidence.]*

19
20 If you find that [defendant] has proved by a preponderance of the evidence that [specify
21 accommodation] would be an undue hardship, then you must find for [defendant].]

22 23 24 **Comment**

25
26 The basics of an action for reasonable accommodation under the ADA were set forth by the
27 Third Circuit in *Skerski v. Time Warner Cable Co.*, 257 F.3d 273 (3d Cir. 2001).

28
29 [A] disabled employee may establish a prima facie case under the ADA if s/he shows that
30 s/he can perform the essential functions of the job with reasonable accommodation and that
31 the employer refused to make such an accommodation. According to the ADA, a
32 "reasonable accommodation" includes:

33
34 job restructuring, part-time or modified work schedules, reassignment to a vacant
35 position, acquisition or modification of equipment or devices, appropriate adjustment
36 or modifications of examinations, training materials or policies, the provision of
37 qualified readers or interpreters, and other similar accommodations for individuals
38 with disabilities. 42 U.S.C. § 12111(9)(B).

39
40 The relevant regulations define reasonable accommodations as "modifications or adjustments
41 to the work environment, or to the manner or circumstances under which the position held or
42 desired is customarily performed, that enable a qualified individual with a disability to
43 perform the essential functions of that position." 29 C.F.R. § 1630.2(o)(1)(ii).

1
2 *Skerski*, 257 F.3d at 284. See also *Colwell v. Rite Aid Corp.*, 602 F.3d 495, 505 (3d Cir. 2010)
3 (“[U]nder certain circumstances the ADA can obligate an employer to accommodate an employee's
4 disability-related difficulties in getting to work, if reasonable.”).

5
6 In *Skerski* the employee was a cable worker, and the employer's job description for that
7 position listed climbing poles as one of the job requirements. The employee developed a fear of
8 heights and he was transferred to a warehouse position. The employer argued that this was a
9 reasonable accommodation for the employee's disability, because he would not have to climb in his
10 new position. But the court noted that a transfer to a new position is not a reasonable accommodation
11 if the employee is not qualified to perform the essential functions of that position (and there was
12 evidence, precluding summary judgment, indicating that the plaintiff was not so qualified). It further
13 noted that reassignment "should be considered only when accommodation within the individual's
14 current position would pose an undue hardship." The court relied on the commentary to the pertinent
15 EEOC guideline, which states that "an employer may reassign an individual to a lower graded
16 position if there are no accommodations that would enable the employee to remain in the current
17 position and there are no vacant equivalent positions for which the individual is qualified with or
18 without reasonable accommodation." The court concluded that there was a triable question of fact as
19 to whether the plaintiff could have been accommodated in his job as a cable worker, by the use of a
20 bucket truck so that he would not have to climb poles. The instruction is written to comport with the
21 standards set forth in *Skerski*.

22 23 *Allocation of Burdens—Reasonable Accommodation and the Undue Hardship Defense*

24
25 In *Walton v. Mental Health Ass'n of Southeastern Pa.*, 168 F.3d 661, 670 (3d Cir. 1999), the
26 Third Circuit held that, "on the issue of reasonable accommodation, the plaintiff bears only the
27 burden of identifying an accommodation, the costs of which, facially, do not clearly exceed its
28 benefits." If the plaintiff satisfies that burden, the defendant then has the burden to demonstrate that
29 the proposed accommodation creates an "undue hardship" for it. 42 U.S.C. § 12112(b)(5)(A). See
30 *Turner v. Hershey Chocolate USA*, 440 F.3d 604, 614 (3d Cir. 2006) ("undue hardship" is an
31 affirmative defense). The ADA defines "undue hardship" as "an action requiring significant difficulty
32 or expense, when considered in light of" a series of factors, 42 U.S.C. § 12111(10)(A). The
33 instruction sets forth the list of factors found in the ADA.

34
35 The *Walton* court justified its allocation of burdens as follows:

36
37 This distribution of burdens is both fair and efficient. The employee knows whether
38 her disability can be accommodated in a manner that will allow her to successfully perform
39 her job. The employer, however, holds the information necessary to determine whether the
40 proposed accommodation will create an undue burden for it. Thus, the approach simply
41 places the burden on the party holding the evidence with respect to the particular issue.

42
43 The instruction follows the allocation of burdens set forth in *Walton*. See also *Williams v.*

1 *Philadelphia Housing Auth.*, 380 F.3d 751, 770 (3d Cir. 2004) (in a transfer case, the employee must
2 show “(1) that there was a vacant, funded position; (2) that the position was at or below the level of
3 the plaintiff’s former job; and (3) that the plaintiff was qualified to perform the essential duties of this
4 job with reasonable accommodation. If the employee meets his burden, the employer must
5 demonstrate that transferring the employee would cause unreasonable hardship.”).

6
7 For a case in which the employee did not satisfy his burden of showing a reasonable
8 accommodation, *see Gaul v. Lucent Technologies Inc.*, 134 F.3d 576, 581 (3d Cir. 1998). The
9 employee had an anxiety disorder, and argued essentially that he could be accommodated by
10 placement with other employees who wouldn’t stress him out. The court analyzed this contention in
11 the following passage:

12
13 [W]e conclude that Gaul has failed to satisfy his burden for three reasons. First, Gaul's
14 proposed accommodation would impose a wholly impractical obligation on AT & T or any
15 employer. Indeed, AT & T could never achieve more than temporary compliance because
16 compliance would depend entirely on Gaul's stress level at any given moment. This, in turn,
17 would depend on an infinite number of variables, few of which AT & T controls. Moreover,
18 the term "prolonged and inordinate stress" is not only subject to constant change, it is also
19 subject to tremendous abuse. The only certainty for AT & T would be its obligation to
20 transfer Gaul to another department whenever he becomes "stressed out" by a coworker or
21 supervisor. It is difficult to imagine a more amorphous "standard" to impose on an employer.

22
23 Second, Gaul's proposed accommodation would also impose extraordinary
24 administrative burdens on AT & T. In order to reduce Gaul's exposure to coworkers who
25 cause him prolonged and inordinate stress, AT & T supervisors would have to consider,
26 among other things, Gaul's stress level whenever assigning projects to workers or teams,
27 changing work locations, or planning social events. Such considerations would require far
28 too much oversight and are simply not required under law.

29
30 Third, by asking to be transferred away from individuals who cause him prolonged
31 and inordinate stress, Gaul is essentially asking this court to establish the conditions of his
32 employment, most notably, with whom he will work. However, nothing in the ADA allows
33 this shift in responsibility. . . .

34
35 In sum, Gaul does not meet his burden . . . because his proposed accommodation was
36 unreasonable as a matter of law. Therefore, Gaul is not a "qualified individual" under the
37 ADA, and AT & T's alleged failure to investigate into reasonable accommodation is
38 unimportant.

39 40 *Preferences*

41
42 In *US Airways, Inc., v. Barnett*, 535 U.S. 391, 397 (2002), the Court rejected the proposition
43 that an accommodation cannot be reasonable whenever it gives *any* preference to the disabled

1 employee. The Court concluded that “preferences will sometimes prove necessary to achieve the
2 Act's basic equal opportunity goal.” It elaborated as follows:

3
4 The Act requires preferences in the form of "reasonable accommodations" that are needed for
5 those with disabilities to obtain the *same* workplace opportunities that those without
6 disabilities automatically enjoy. By definition any special "accommodation" requires the
7 employer to treat an employee with a disability differently, *i.e.*, preferentially. And the fact
8 that the difference in treatment violates an employer's disability-neutral rule cannot by itself
9 place the accommodation beyond the Act's potential reach.

10
11 Were that not so, the "reasonable accommodation" provision could not accomplish its
12 intended objective. Neutral office assignment rules would automatically prevent the
13 accommodation of an employee whose disability-imposed limitations require him to work on
14 the ground floor. Neutral "break-from-work" rules would automatically prevent the
15 accommodation of an individual who needs additional breaks from work, perhaps to permit
16 medical visits. Neutral furniture budget rules would automatically prevent the
17 accommodation of an individual who needs a different kind of chair or desk. Many
18 employers will have neutral rules governing the kinds of actions most needed to reasonably
19 accommodate a worker with a disability. See 42 U.S.C. § 12111(9)(b) (setting forth
20 examples such as "job restructuring," "part-time or modified work schedules," "acquisition or
21 modification of equipment or devices," "and other similar accommodations"). Yet Congress,
22 while providing such examples, said nothing suggesting that the presence of such neutral
23 rules would create an automatic exemption. Nor have the lower courts made any such
24 suggestion.

25
26 . . . The simple fact that an accommodation would provide a "preference" -- in the
27 sense that it would permit the worker with a disability to violate a rule that others must obey
28 -- cannot, *in and of itself*, automatically show that the accommodation is not "reasonable."

29 30 *Seniority Plans and Other Disability-Neutral Employer Rules*

31
32 While rejecting the notion that preferences were *never* reasonable, the *Barnett* Court
33 recognized that employers have a legitimate interest in preserving seniority programs, and found that
34 the ADA generally does not require an employer to “bump” a more senior employee in favor of a
35 disabled one. The Court found “nothing in the statute that suggests Congress intended to undermine
36 seniority systems in this way. And we consequently conclude that the employer's showing of
37 violation of the rules of a seniority system is by itself ordinarily sufficient” to show that the suggested
38 accommodation would not be reasonable. The Court held that if a proposed accommodation would
39 be contrary to a seniority plan, the plaintiff would have the burden of showing “special
40 circumstances” indicating that the accommodation was reasonable. The Court explained as follows:

41
42 The plaintiff (here the employee) nonetheless remains free to show that special circumstances
43 warrant a finding that, despite the presence of a seniority system (which the ADA may not

1 trump in the run of cases), the requested "accommodation" is "reasonable" on the particular
2 facts. . . . The plaintiff might show, for example, that the employer, having retained the right
3 to change the seniority system unilaterally, exercises that right fairly frequently, reducing
4 employee expectations that the system will be followed -- to the point where one more
5 departure, needed to accommodate an individual with a disability, will not likely make a
6 difference. The plaintiff might show that the system already contains exceptions such that, in
7 the circumstances, one further exception is unlikely to matter. We do not mean these
8 examples to exhaust the kinds of showings that a plaintiff might make. But we do mean to
9 say that the plaintiff must bear the burden of showing special circumstances that make an
10 exception from the seniority system reasonable in the particular case. And to do so, the
11 plaintiff must explain why, in the particular case, an exception to the employer's seniority
12 policy can constitute a "reasonable accommodation" even though in the ordinary case it
13 cannot.

14
15 535 U.S. at 404.

16
17 The Third Circuit, in *Shapiro v. Township of Lakewood*, 292 F.3d 356, 361 (3d Cir. 2002),
18 held that the *Barnett* analysis was applicable any time that a suggested accommodation would
19 conflict with any disability-neutral rule of the employer (in that case a job application requirement).
20 The Court summarized the *Barnett* analysis as follows:

21
22 It therefore appears that the *Barnett* Court has prescribed the following two-step approach for
23 cases in which a requested accommodation in the form of a job reassignment is claimed to
24 violate a disability-neutral rule of the employer. The first step requires the employee to show
25 that the accommodation is a type that is reasonable in the run of cases. The second step varies
26 depending on the outcome of the first step. If the accommodation is shown to be a type of
27 accommodation that is reasonable in the run of cases, the burden shifts to the employer to
28 show that granting the accommodation would impose an undue hardship under the particular
29 circumstances of the case. On the other hand, if the accommodation is not shown to be a type
30 of accommodation that is reasonable in the run of cases, the employee can still prevail by
31 showing that special circumstances warrant a finding that the accommodation is reasonable
32 under the particular circumstances of the case.

33 34 *The Interactive Process*

35
36 The ADA itself does not specifically provide that the employer has an obligation to engage in
37 an interactive process with the employee to determine whether a reasonable accommodation can be
38 found for the employee's disability. But the Third Circuit has established that good faith participation
39 in an interactive process is an important factor in determining whether a reasonable accommodation
40 exists. The court in *Williams v. Philadelphia Housing Auth.*, 380 F.3d 751, 772 (3d Cir. 2004)
41 explained the interactive process requirement as follows:

42
43 [W]e have repeatedly held that an employer has a duty under the ADA to engage in an

1 "interactive process" of communication with an employee requesting an accommodation so
2 that the employer will be able to ascertain whether there is in fact a disability and, if so, the
3 extent thereof, and thereafter be able to assist in identifying reasonable accommodations
4 where appropriate. "The ADA itself does not refer to the interactive process," but does
5 require employers to "make reasonable accommodations" under some circumstances for
6 qualified individuals. *Shapiro v. Township of Lakewood*, 292 F.3d 356, 359 (3d Cir. 2002).
7 With respect to what consists of a "reasonable accommodation," EEOC regulations indicate
8 that,

9
10 to determine the appropriate reasonable accommodation it may be necessary for the
11 covered entity to initiate an informal, interactive process with the qualified individual
12 with a disability in need of the accommodation. This process should identify the
13 precise limitations resulting from the disability and potential reasonable
14 accommodations that could overcome those limitations. 29 C.F.R. § 1630.2(o)(3).
15

16 *See also Jones v. UPS*, 214 F.3d 402, 407 (3d Cir. 2000) ("Once a qualified individual with a
17 disability has requested provision of a reasonable accommodation, the employer must make a
18 reasonable effort to determine the appropriate accommodation. The appropriate reasonable
19 accommodation is best determined through a flexible, interactive process that involves both the
20 employer and the [employee] with a disability.") (quoting 29 C.F.R. Pt. 1630, App. § 1630.9).
21

22 An employee can demonstrate that an employer breached its duty to provide reasonable
23 accommodations because it failed to engage in good faith in the interactive process by showing that:
24 1) the employer knew about the employee's disability; 2) the employee requested accommodations or
25 assistance for his or her disability; 3) the employer did not make a good faith effort to assist the
26 employee in seeking accommodations; and 4) the employee could have been reasonably
27 accommodated but for the employer's lack of good faith. *Taylor v. Phoenixville School Dist.*, 184
28 F.3d 296, 312 (3d Cir. 1999).
29

30 The failure to engage in an interactive process is not sufficient in itself to establish a claim
31 under the ADA, however. *See Hohider v. United Parcel Service, Inc.*, 574 F.3d 169, 193 (3d Cir.
32 2009) (failure to engage in interactive process with an employee who is not a "qualified individual"
33 does not violate ADA). For one thing, a "plaintiff in a disability discrimination case who claims that
34 the defendant engaged in discrimination by failing to make a reasonable accommodation cannot
35 recover without showing that a reasonable accommodation was possible." *Williams v. Philadelphia*
36 *Housing Auth.*, 380 F.3d 751, 772 (3d Cir. 2004).
37

38 The employer's obligation to engage in an interactive process does not arise until the
39 employer has been informed that the employee is requesting an accommodation. *See Peter v. Lincoln*
40 *Technical Institute*, 255 F.Supp.2d 417, 437 (E.D.Pa. 2002):
41

42 The employee bears the responsibility of initiating the interactive process by providing notice
43 of her disability and requesting accommodation for it. The employee's request need not be

1 written, nor need it include the magic words “reasonable accommodation,” but the notice
2 must nonetheless make clear that the employee wants assistance for his or her disability.
3 Once the employer knows of the disability and the desire for the accommodation, it has the
4 burden of requesting any additional information that it needs, and to engage in the interactive
5 process of designing a reasonable accommodation -- the employer may not in the face of a
6 request for accommodation, simply sit back passively, offer nothing, and then, in post-
7 termination litigation, try to knock down every specific accommodation as too burdensome.
8 (citations omitted).
9

10 *See also Conneen v. MBNA America Bank, N.A.*, 334 F.3d 318, 332 (3d Cir. 2003) (“MBNA cannot
11 be held liable for failing to read Conneen’s tea leaves. Conneen had an obligation to truthfully
12 communicate any need for an accommodation, or to have her doctor do so on her behalf if she was
13 too embarrassed to respond to MBNA’s many inquiries into any reason she may have had for
14 continuing to be late.”).

15
16 It is not necessary that the employee himself or herself notify the employer of a need for
17 accommodation; the question is whether the employer has received fair notice of that need. *Taylor v.*
18 *Phoenixville School Dist.*, 184 F.3d 296, 312 (3d Cir. 1999) (notice was sufficient where it was
19 supplied by a member of the employee’s family; the fundamental requirement is that “the employer
20 must know of both the disability and the employee’s desire for accommodations for that disability.”).

21
22 Nor is the plaintiff required to request a particular accommodation; it is enough that the
23 employer is made aware of the basic need for accommodation. *Armstrong v. BurdetteTomlin*
24 *Memorial Hosp.*, 438 F.3d 240, 248 (3d Cir. 2006) (error to instruct the jury that the plaintiff had the
25 burden of requesting a specific reasonable accommodation “when, in fact, he only had to show he
26 requested an accommodation”).
27

28 *Reasonable Accommodation Requirement as Applied to “Regarded as” Disability*

29

30 The ADA provides protection for an employee who is erroneously “regarded as” disabled by
31 an employer. (See the Comment to Instruction 9.2.1 for a discussion of “regarded as” disability).
32 Questions have arisen about the relationship between “regarded as” disability and the employer’s duty
33 to provide a reasonable accommodation to a qualified disabled employee. In *Williams v.*
34 *Philadelphia Housing Auth.*, 380 F.3d 751, 770 (3d Cir. 2004), the employer argued that it had no
35 obligation to provide a reasonable accommodation to an employee it “regarded as” disabled because
36 there was no job available that would accommodate the perceived disability—that is, the defendant
37 regarded the employee as completely unable to do any job at all. The court described the employer’s
38 argument, and rejected it, in the following passage:
39

40 To the extent Williams relies upon a “regarded as” theory of disability, PHA contends
41 that a plaintiff in Williams’s position must show that there were vacant, funded positions
42 whose essential functions the employee was capable of performing *in the eyes of the*
43 *employer who misperceived the employee’s limitations*. Even if a trier of fact concludes that

1 PHA wrongly perceived Williams's limitations to be so severe as to prevent him from
2 performing any law enforcement job, the "regarded as" claim must, in PHA's view, fail
3 because Williams has been unable to demonstrate the existence of a vacant, funded position
4 at PHA whose functions he was capable of performing in light of its misperception. . . .
5 PHA's argument, if accepted, would make "regarded as" protection meaningless. An
6 employer could simply regard an employee as incapable of performing any work, and an
7 employee's "regarded as" failure to accommodate claim would always fail, under PHA's
8 theory, because the employee would never be able to demonstrate the existence of any
9 vacant, funded positions he or she was capable of performing in the eyes of the employer. . . .
10 Thus, contrary to PHA's suggestion, a "regarded as" disabled employee need not demonstrate
11 during litigation the availability of a position he or she was capable of performing in the eyes
12 of the misperceiving employer. . . .
13

14 To meet his litigation burden with respect to both his "actual" and "regarded as"
15 disability claims, Williams need only show (1) that there was a vacant, funded position; (2)
16 that the position was at or below the level of the plaintiff's former job; and (3) that the
17 plaintiff was qualified to perform the essential duties of this job with reasonable
18 accommodation. If the employee meets his burden, the employer must demonstrate that
19 transferring the employee would cause unreasonable hardship.
20

21 The employer in *Williams* made an alternative argument: that if an employee is "regarded as"
22 but not actually disabled, the employer should have no duty to provide a reasonable accommodation
23 because there is nothing to accommodate. In *Williams*, the plaintiff was a police officer and the
24 employer regarded him as being unable to be around firearms because of a mental impairment. The
25 court analyzed the defendant's argument that it had no duty to provide an accommodation to an
26 employee "regarded as" disabled, and rejected it, in the following passage:
27

28 PHA . . . suggests that Williams, by being "regarded as" disabled by PHA, receives a
29 "windfall" accommodation compared to a similarly situated employee who had not been
30 "regarded as" disabled and would not be entitled under the ADA to any accommodation. The
31 record in this case demonstrates that, absent PHA's erroneous perception that Williams could
32 not be around firearms because of his mental impairment, a radio room assignment would
33 have been made available to him and others similarly situated. PHA refused to provide that
34 assignment solely based upon its erroneous perception that Williams's mental impairment
35 prevented him not only from carrying a gun, but being around others with, or having access
36 to, guns - perceptions specifically contradicted by PHA's own psychologist. While a similarly
37 situated employee who was not perceived to have this additional limitation would have been
38 allowed a radio room assignment, Williams was specifically denied such an assignment
39 because of the erroneous perception of his disability. The employee whose limitations are
40 perceived accurately gets to work, while Williams is sent home unpaid. This is precisely the
41 type of discrimination the "regarded as" prong literally protects from Accordingly,
42 Williams, to the extent PHA regarded him as disabled, was entitled to reasonable
43 accommodation

1
2 Thus, an employee “regarded as” having a disability is entitled to the same accommodation that he
3 would receive were he actually disabled. *See also Kelly v. Metallics West, Inc.*, 410 F.3d 670, 676
4 (10th Cir. 2005) (“An employer who is unable or unwilling to shed his or her stereotypic assumptions
5 based on a faulty or prejudiced perception of an employee’s abilities must be prepared to
6 accommodate the artificial limitations created by his or her own faulty perceptions. In this sense, the
7 ADA encourages employers to become more enlightened about their employees’ capabilities, while
8 protecting employees from employers whose attitudes remain mired in prejudice.”).
9

10 *Direct Threat*

11

12 The ADA provides a defense if the employment or accommodation of an otherwise qualified,
13 disabled individual would pose a “direct threat” to the individual or to others. The “direct threat”
14 affirmative defense is applicable both to disparate treatment claims and reasonable accommodation
15 claims. *See Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73 (2002); *Buskirk v. Apollo Metals*, 307
16 F.3d 160, 168 (3d Cir. 2002). See 9.3.1 for an instruction on the “direct threat” affirmative defense.
17

18 *Statutory Definitions*

19

20 The ADA employs complicated and sometimes counterintuitive statutory definitions for
21 many of the important terms that govern a disparate treatment action. Instructions for these statutory
22 definitions are set forth at 9.2.1-2. They are not included in the body of the reasonable
23 accommodations instruction because not all of them will ordinarily be in dispute in a particular case,
24 and including all of them would unduly complicate the basic instruction.

9.1.4 Elements of an ADA Claim — Harassment — Hostile Work Environment — Tangible Employment Action

Model

[Plaintiff] claims that [he/she] was subjected to harassment by [names] and that this harassment was motivated by [plaintiff's] [disability/request for accommodation].

[Employer] is liable for the actions of [names] in plaintiff's claim of harassment if [plaintiff] proves all of the following elements by a preponderance of the evidence:

First: [Plaintiff] has a "disability" within the meaning of the ADA;

Second: [Plaintiff] is a "qualified individual" within the meaning of the ADA;

Third: [Plaintiff] was subjected to [describe alleged conduct or conditions giving rise to plaintiff's claim] by [names].

Fourth: [names] conduct was not welcomed by [plaintiff].

Fifth: [names] conduct was motivated by the fact that [plaintiff] has a "disability," as defined by the ADA [or sought an accommodation for that disability].

Sixth: The conduct was so severe or pervasive that a reasonable person in [plaintiff's] position would find [plaintiff's] work environment to be hostile or abusive. This element requires you to look at the evidence from the point of view of the reaction of a reasonable person with [plaintiff's] disability to [plaintiff's] work environment.

Seventh: [Plaintiff] believed [his/her] work environment to be hostile or abusive as a result of [names] conduct.

Eighth: [Plaintiff] suffered an adverse "tangible employment action" as a result of the hostile work environment; a tangible employment action is defined as a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits.

[For use when the alleged harassment is by non-supervisory employees:

Ninth: Management level employees knew, or should have known, of the abusive conduct. Management level employees should have known of the abusive conduct if 1) an employee provided management level personnel with enough information to raise a probability of harassment on grounds of disability [or request for accommodation] in the mind of a reasonable employer, or if 2) the harassment was so pervasive and open that a reasonable

1 employer would have had to be aware of it.]

2
3 [I will now provide you with more explicit instructions on the following statutory terms:

4
5 1. "Disability." — Instruction 9.2.1

6
7 2. "Qualified" — See Instruction 9.2.2]

8
9
10 **Comment**

11
12 In *Walton v. Mental Health Assoc. of Southeastern Pennsylvania*, 168 F.3d 661, 666 (3d Cir.
13 1999), the court considered whether a cause of action for harassment/hostile work environment was
14 cognizable under the ADA. The court's analysis is as follows:

15
16 The Supreme Court has held that language in Title VII that is almost identical to the .
17 . . language in the ADA creates a cause of action for a hostile work environment. See
18 *Patterson v. McLean Credit Union*, 491 U.S. 164, 180 (1989). In addition, we have
19 recognized that:

20
21 in the context of employment discrimination, the ADA, ADEA and Title VII all serve
22 the same purpose--to prohibit discrimination in employment against members of
23 certain classes. Therefore, it follows that the methods and manner of proof under one
24 statute should inform the standards under the others as well. Indeed, we routinely use
25 Title VII and ADEA caselaw interchangeably, when there is no material difference in
26 the question being addressed.

27
28 *Newman v. GHS Osteopathic, Inc.*, 60 F.3d 153, 157 (3d Cir. 1995). This framework
29 indicates that a cause of action for harassment exists under the ADA. However, like other
30 courts, we will assume this cause of action without confirming it because Walton did not
31 show that she can state a claim.

32
33 The *Walton* court also noted that many courts "have proceeded on the assumption that the ADA
34 creates a cause of action for a hostile work environment but avoided confirming that the claim
35 exists." See, e.g., *Wallin v. Minnesota Dept. of Corrections*, 153 F.3d 681, 687-88 (8th Cir. 1998)
36 ("We will assume, without deciding, that such a cause of action exists."); *McConathy v. Dr.*
37 *Pepper/Seven Up Corp.*, 131 F.3d 558, 563 (5th Cir. 1998) (noting that various district courts have
38 assumed the claim's existence and assuming its existence in order to dispense with appeal). District
39 courts in the Third Circuit have also assumed, without deciding, that a claim for harassment exists
40 under the ADA. See, e.g., *Vendetta v. Bell Atlantic Corp.*, 1998 WL 575111 (E.D. Pa. Sep. 8, 1998)
41 (noting that because the Supreme Court has read a cause of action for harassment into Title VII, the
42 same is appropriate under the ADA). There appears to be no reported case holding that a harassment
43 claim cannot be asserted under the ADA.

1
2 Accordingly, instructions are included herein to cover harassment claims under the ADA;
3 these instructions conform to the instructions for harassment claims in Title VII and ADEA actions.
4 See *Walton*, 168 F.3d at 667 (“A claim for harassment based on disability, like one under Title VII,
5 would require a showing that: 1) Walton is a qualified individual with a disability under the ADA; 2)
6 she was subject to unwelcome harassment; 3) the harassment was based on her disability or a request
7 for an accommodation; 4) the harassment was sufficiently severe or pervasive to alter the conditions
8 of her employment and to create an abusive working environment; and 5) that [the employer] knew
9 or should have known of the harassment and failed to take prompt effective remedial action.”).

10
11 If the court wishes to provide a more detailed instruction on what constitutes a hostile work
12 environment, such an instruction is provided in 9.2.3.

13
14 It should be noted that constructive discharge is the adverse employment action that is most
15 common with claims of hostile work environment.⁵ Instruction 9.2.4 provides an instruction setting
16 forth the relevant factors for a finding of constructive discharge. That instruction can be used to
17 amplify the term “adverse employment action” in appropriate cases. In *Spencer v. Wal-Mart Stores,*
18 *Inc.*, 469 F.3d 311, 317 (3d Cir. 2006), the court held that an ADA plaintiff cannot receive back pay
19 in the absence of a constructive discharge. “Put simply, if a hostile work environment does not rise to
20 the level where one is forced to abandon the job, loss of pay is not an issue.”

21
22 The instruction’s definition of “tangible employment action” is taken from *Burlington*
23 *Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

24
25 Respondeat superior liability for harassment by non-supervisory employees exists only where
26 “the defendant knew or should have known of the harassment and failed to take prompt remedial
27 action.” *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990). See also *Kunin v.*
28 *Sears Roebuck and Co.*, 175 F.3d 289, 294 (3d Cir. 1999):
29

⁵ As Comment 9.1.5 notes (by analogy to the framework for Title VII hostile environment claims) the employer may raise an affirmative defense under *Faragher v. Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), if no tangible employment action has been taken against the plaintiff. In *Pennsylvania State Police v. Suders*, 542 U.S. 129, 140-41 (2004), the Court addressed the question of constructive discharge in a Title VII case, holding “that an employer does not have recourse to the *Ellerth/ Faragher* affirmative defense when a supervisor’s official act precipitates the constructive discharge; absent such a ‘tangible employment action,’ however, the defense is available to the employer whose supervisors are charged with harassment.” Assuming that the same approach applies in ADA cases, Instruction 9.1.4 is appropriate for use in cases where the evidence supports a claim that the constructive discharge resulted from an official act or acts. However, where the constructive discharge did not result from an official act, an affirmative defense is available to the employer and Instruction 9.1.5 should be used instead.

1 [T]here can be constructive notice in two situations: where an employee provides
2 management level personnel with enough information to raise a probability of sexual
3 harassment in the mind of a reasonable employer, or where the harassment is so pervasive
4 and open that a reasonable employer would have had to be aware of it. We believe that these
5 standards strike the correct balance between protecting the rights of the employee and the
6 employer by faulting the employer for turning a blind eye to overt signs of harassment but
7 not requiring it to attain a level of omniscience, in the absence of actual notice, about all
8 misconduct that may occur in the workplace.
9

10 For a discussion of the definition of “management level personnel” in a Title VII case, see Comment
11 5.1.4 (discussing *Huston v. Procter & Gamble Paper Prods. Corp.*, 568 F.3d 100, 108 (3d Cir.
12 2009)).
13

14 The Supreme Court in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993), explained that a
15 hostile work environment claim has both objective and subjective components. A hostile
16 environment must be “one that a reasonable person would find hostile and abusive, and one that the
17 victim in fact did perceive to be so.” The instruction accordingly sets forth both objective and
18 subjective components.
19

20 For further commentary on hostile work environment claims, see Comment 5.1.4.

9.1.5 Elements of an ADA Claim — Harassment — Hostile Work Environment — No Tangible Employment Action

Model

[Plaintiff] claims that [he/she] was subjected to harassment by [names] and that this harassment was motivated by [plaintiff's] [disability/request for accommodation].

[Employer] is liable for the actions of [names] in [plaintiff's] claim of harassment if [plaintiff] proves all of the following elements by a preponderance of the evidence:

First: [Plaintiff] has a "disability" within the meaning of the ADA;

Second: [Plaintiff] is a "qualified individual" within the meaning of the ADA;

Third: [Plaintiff] was subjected to [describe alleged conduct or conditions giving rise to plaintiff's claim] by [names].

Fourth: [names] conduct was not welcomed by [plaintiff].

Fifth: [names] conduct was motivated by the fact that [plaintiff] has a "disability," as defined by the ADA [or sought an accommodation for that disability].

Sixth: The conduct was so severe or pervasive that a reasonable person in [plaintiff's] position would find [plaintiff's] work environment to be hostile or abusive. This element requires you to look at the evidence from the point of view of the reaction of a reasonable person with [plaintiff's] disability to [plaintiff's] work environment.

Seventh: [Plaintiff] believed [his/her] work environment to be hostile or abusive as a result of [names] conduct.

[For use when the alleged harassment is by non-supervisory employees:

Eighth: Management level employees knew, or should have known, of the abusive conduct. Management level employees should have known of the abusive conduct if 1) an employee provided management level personnel with enough information to raise a probability of harassment on grounds of disability [or request for accommodation] in the mind of a reasonable employer, or if 2) the harassment was so pervasive and open that a reasonable employer would have had to be aware of it.]

[I will now provide you with more explicit instructions on the following statutory terms:

1 1. "Disability." — Instruction 9.2.1

2
3 2. "Qualified" — See Instruction 9.2.2]

4
5
6 If any of the above elements has not been proved by a preponderance of the evidence, your
7 verdict must be for [defendant] and you need not proceed further in considering this claim. If you
8 find that the elements have been proved, then you must consider [defendant's] affirmative defense. I
9 will instruct you now on the elements of that affirmative defense.

10
11 You must find for [defendant] if you find that [defendant] has proved both of the following
12 elements by a preponderance of the evidence:

13
14 First: That [defendant] exercised reasonable care to prevent harassment in the workplace on
15 the basis of a disability [or request for accommodation], and also exercised reasonable care to
16 promptly correct any harassing behavior that does occur.

17
18 Second: That [plaintiff] unreasonably failed to take advantage of any preventive or corrective
19 opportunities provided by [defendant].

20
21 Proof of the following facts will be enough to establish the first element that I just referred to,
22 concerning prevention and correction of harassment:

23
24 1. [Defendant] had established an explicit policy against harassment in the workplace
25 on the basis of disability [or request for accommodation].

26
27 2. That policy was fully communicated to its employees.

28
29 3. That policy provided a reasonable way for [plaintiff] to make a claim of
30 harassment to higher management.

31
32 4. Reasonable steps were taken to correct the problem, if raised by [plaintiff].

33
34 On the other hand, proof that [plaintiff] did not follow a reasonable complaint procedure
35 provided by [defendant] will ordinarily be enough to establish that [plaintiff] unreasonably failed to
36 take advantage of a corrective opportunity.

37 38 39 **Comment**

40
41 As discussed in the Comment to Instruction 9.1.4, the Third Circuit has assumed that the
42 ADA provides a cause of action for harassment/hostile work environment, and that such a cause of
43 action (assuming it exists) is to be governed by the same standards applicable to a hostile work

1 environment claim under Title VII. *Walton v. Mental Health Assoc. of Southeastern Pennsylvania*,
2 168 F.3d 661, 666 (3d Cir. 1999).

3
4 This instruction is substantively identical to Instruction 5.1.5, covering hostile work
5 environment claims with no tangible employment action under Title VII. Like Title VII — and unlike
6 Section 1981 — the ADA regulates employers only, and not individual employees. Therefore, the
7 instruction is written in terms of employer liability for the acts of its employees.

8
9 This instruction is to be used in discriminatory harassment cases where the plaintiff did not
10 suffer any "tangible" employment action such as discharge or demotion or constructive discharge,
11 but rather suffered "intangible" harm flowing from harassment that is "sufficiently severe or
12 pervasive to create a hostile work environment." *Faragher v. Boca Raton*, 524 U.S. 775, 808 (1998).
13 In *Faragher* and in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), the Court held that an
14 employer is strictly liable for supervisor harassment that "culminates in a tangible employment
15 action, such as discharge, demotion, or undesirable reassignment." *Ellerth*, 524 U.S. at 765. But
16 when no such tangible action is taken, the employer may raise an affirmative defense to liability. To
17 prevail on the basis of the defense, the employer must prove that "(a) [it] exercised reasonable care to
18 prevent and correct promptly any sexually harassing behavior," and that (b) the employee
19 "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the
20 employer or to avoid harm otherwise." *Ellerth*, 524 U.S. at 751 (1998).

21
22 Besides the affirmative defense provided by *Ellerth*, the absence of a tangible employment
23 action also justifies requiring the plaintiff to prove a further element, in order to protect the employer
24 from unwarranted liability for the discriminatory acts of its non-supervisor employees. Respondeat
25 superior liability for the acts of non-supervisory employees exists only where "the defendant knew or
26 should have known of the harassment and failed to take prompt remedial action." *Andrews v. City of*
27 *Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990). *See also Kunin v. Sears Roebuck and Co.*, 175
28 F.3d 289, 294 (3d Cir. 1999):

29
30 [T]here can be constructive notice in two situations: where an employee provides
31 management level personnel with enough information to raise a probability of sexual
32 harassment in the mind of a reasonable employer, or where the harassment is so pervasive
33 and open that a reasonable employer would have had to be aware of it. We believe that these
34 standards strike the correct balance between protecting the rights of the employee and the
35 employer by faulting the employer for turning a blind eye to overt signs of harassment but
36 not requiring it to attain a level of omniscience, in the absence of actual notice, about all
37 misconduct that may occur in the workplace.

38
39 For a discussion of the definition of "management level personnel" in a Title VII case, see Comment
40 5.1.4 (discussing *Huston v. Procter & Gamble Paper Prods. Corp.*, 568 F.3d 100, 108 (3d Cir.
41 2009)).

42
43 The Supreme Court in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993), explained that a

1 hostile work environment claim has both objective and subjective components. A hostile
2 environment must be “one that a reasonable person would find hostile and abusive, and one that the
3 victim in fact did perceive to be so.” The instruction accordingly sets forth both objective and
4 subjective components.

5
6 In *Spencer v. Wal-Mart Stores, Inc.*, 469 F.3d 311, 317 (3d Cir. 2006), the court held that an
7 ADA plaintiff cannot receive back pay in the absence of a constructive discharge. “Put simply, if a
8 hostile work environment does not rise to the level where one is forced to abandon the job, loss of
9 pay is not an issue.”

10
11 If the court wishes to provide a more detailed instruction on what constitutes a hostile work
12 environment, such an instruction is provided in 9.2.3.

13
14 For further commentary on hostile work environment claims, see Instructions 5.1.4 and 5.1.5.

9.1.6 Elements of an ADA Claim — Disparate Impact

No Instruction

Comment

Disparate impact claims are cognizable under the ADA. *Raytheon Co. v. Hernandez*, 540 U.S. 44, 50 (2003) (“Both disparate-treatment and disparate-impact claims are cognizable under the ADA.”). See 42 U.S.C. § 12112(b) (defining “discriminate” to include “utilizing standards, criteria, or methods of administration . . . that have the effect of discrimination on the basis of disability” and “using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability”). No instruction is provided on disparate impact claims, however, because a right to jury trial is not provided under the ADA for such claims. 42 U.S.C. § 1981(b)(1) provides that in an action brought under 42 U.S.C. § 2000e-5 (Title VII), a plaintiff may recover compensatory and punitive damages, *but not* if the allegation is that an employment practice is unlawful “because of its disparate impact.” Thus under Title VII, disparate impact claimants cannot recover damages, and therefore there is no right to jury trial for such claims. See *Pollard v. Wawa Food Market*, 366 F.Supp.2d 247 (E.D.Pa. 2005) (striking a demand for a jury trial on a disparate impact claim brought under Title VII). The same result is mandated for ADA disparate impact claims, because the enforcement provision of the ADA, 42 U.S.C. § 12117 specifically provides for the same recovery in ADA actions as in Title VII actions: “The powers, remedies and procedures set forth in . . . [42 U.S.C. § 2000e-5] shall be the powers, remedies and procedures this title provides to . . . any person alleging discrimination on the basis of disability in violation of any provision of this Act . . . concerning employment.”

In *Smith v. City of Jackson*, 544 U.S. 228 (2005), the Supreme Court held that disparate impact claims are cognizable under the Age Discrimination in Employment Act. The ADEA provides a right to jury trial in such claims. See 29 U.S.C. § 626(c)(2) (“[A] person shall be entitled to a trial by jury of any issue of fact in any [ADEA] action . . . regardless of whether equitable relief is sought by any party in such action.”) If an ADEA disparate impact claim is tried together with an ADA disparate impact claim, the parties or the court may decide to refer the ADA claim to the jury. In that case, the instruction provided for ADEA disparate impact claims (see Instruction 8.1.5) can be modified to apply to the ADA claim. Care must be taken, however, to instruct separately on the ADA disparate impact claim, as the substantive standards of recovery under the ADA in disparate impact cases may be different from those applicable to the ADEA. See the Comment to Instruction 8.1.5 for a more complete discussion.

9.1.7 Elements of an ADA Claim — Retaliation⁶

Model

[Plaintiff] claims that [defendant] discriminated against [him/her] because of [plaintiff's] [describe protected activity].⁷

To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of the evidence:

First: [Plaintiff] [describe activity protected by the ADA].

Second: [Plaintiff] was subjected to a materially adverse action at the time, or after, the protected conduct took place.

Third: There was a causal connection between [describe challenged activity] and [plaintiff's] [describe protected activity].

Concerning the first element, [plaintiff] need not prove the merits of [describe conduct], but only that [plaintiff] was acting under a good faith belief that [plaintiff's] [or someone else's] right to be [free from discrimination on the basis of a disability] [free to request an accommodation for a disability] was violated.

Concerning the second element, the term “materially adverse” means that [plaintiff] must show [describe alleged retaliatory activity] was serious enough that it well might have discouraged a reasonable worker from [describe protected activity]. [The activity need not be related to the workplace or to [plaintiff's] employment.]

Concerning the third element, that of causal connection, that connection may be shown in many ways. For example, you may or may not find that there is a sufficient connection through timing, that is [defendant's] action followed shortly after [defendant] became aware of [describe activity]. Causation is, however, not necessarily ruled out by a more extended passage of time. Causation may or may not be proven by antagonism shown toward [plaintiff] or a change in demeanor toward [plaintiff].

⁶ Some courts have held that there is no right to jury trial for an ADA retaliation claim. See the Comment to this instruction.

⁷ In some cases, an employer might retaliate against a plaintiff for the protected activity of another employee. As Comment 9.1.7 discusses, Instruction 9.1.7 can be modified to address such third-party retaliation claims.

1 [Plaintiff] can recover for retaliation even if [plaintiff] did not have a “disability” within the
2 meaning of the ADA. The question is not whether there was a “disability” but whether [defendant]
3 retaliated for the [describe protected activity of plaintiff].
4

5 Ultimately, you must decide whether [plaintiff's] [protected activity] had a determinative
6 effect on [describe alleged retaliatory activity]. “Determinative effect” means that if not for
7 [plaintiff's] [protected activity], [describe alleged retaliatory activity] would not have occurred.
8

9 **Comment**

10 *The Right to Jury Trial for ADA Retaliation Claims*

11
12
13 At least one court in the Third Circuit has held that a plaintiff's recovery for retaliation under
14 the ADA is limited to equitable relief, and accordingly there is no right to jury trial on an ADA
15 retaliation claim. The court in *Sabbrese v. Lowe's Home Centers, Inc.*, 320 F.Supp.2d 311, 331
16 (W.D.Pa. 2004), considered a defendant's claim that the plaintiff did not have a right to a jury trial on
17 his ADA retaliation claim. The plaintiff argued that because compensatory and punitive damages are
18 available for retaliation actions under Title VII, they likewise are available for an ADA retaliation
19 claim.
20

21 The *Sabbrese* court agreed with the defendant, finding persuasive the Seventh Circuit's
22 analysis in *Kramer v. Banc of America Securities LLC*, 355 F.3d 961 (7th Cir. 2004). The *Sabbrese*
23 court's analysis on the jury trial question is as follows:
24

25 The enforcement provision of the ADA is codified at 42 U.S.C. § 12117. That section
26 provides that the available remedies under the ADA are the same as provided in the 1964
27 Civil Rights Act, 42 U.S.C. § 2000e-4 through e-9. Section 2000e-5(g)(1) of the Civil Rights
28 Act limits the remedies available under that act to equitable relief, including back pay, but
29 does not provide for compensatory or punitive damages. *Kramer*, 355 F.3d at 964. The 1991
30 Civil Rights Act, 42 U.S.C. § 1981a(a)(2), expanded the remedies available in section
31 2000e-5(g)(1) to provide for compensatory and punitive damages in certain circumstances.
32 With respect to the ADA, section 1981a(a)(2) provided that a complaining party could
33 recover compensatory and punitive damages for violations of section 102 or section
34 102(b)(5) of the ADA, codified at 42 U.S.C. §§ 12112 and 12112(b)(5). Sections 12112 and
35 12112(b)(5) deal with an employer's failure to make reasonable accommodations to a
36 qualified employee with a disability [and also to disparate treatment claims], while section
37 12203 - not listed in section 1981a(a)(2) - establishes retaliation claims under the ADA.
38

39 After reviewing the applicable statutes, the United States Court of Appeals for the
40 Seventh Circuit concluded that the plaintiff was precluded from recovering compensatory
41 and punitive damages under her ADA retaliation claim. The court determined that section
42 1981a(a)(2) permitted recovery of compensatory and punitive damages only for the claims
43 listed in that statute, such as section 12112 of the ADA, and since the section establishing

1 retaliation claims under the ADA (42 U.S.C. § 12203) was not listed, compensatory and
2 punitive damages were unavailable. This court adopts the persuasive rationale of *Kramer* and
3 accordingly holds that compensatory and punitive damages are not available.
4

5 After finding that only equitable relief was available for a claim of retaliation under the
6 ADA, the *Sabbrese* court referred to Third Circuit authority to determine that the plaintiff had no
7 right to jury trial on the claim:
8

9 The United States Court of Appeals for the Third Circuit offered guidance with
10 respect to whether the right to a trial by jury exists in *Cox v. Keystone Carbon Co.*, 861 F.2d
11 390 (3d Cir. 1988). There, the court stated that "in determining a party's right to a jury trial it
12 is the procedural and remedial sections of the statute creating the right which must be
13 examined." *Id.* at 392. The court concluded that "where the particular remedial section in the
14 statute provides for only equitable remedies then no right to a jury trial exists." *Id.* The court
15 further cautioned that "within a particular statute a right to a jury might exist as to some of
16 the enforcement sections and not as to others," and that courts must be careful to examine the
17 applicable subsections at issue to determine which remedies are available. *Id.* *Cox*, thus,
18 requires the court to examine the statutory provisions of the ADA concerning retaliation
19 claims in order to determine the nature of relief that may be awarded. If the court determines
20 that the remedy is "explicitly equitable, then there is no seventh amendment right to a jury."
21 *Id.* (citing *Curtis v. Loether*, 415 U.S. 189, 194-95 (1974)).
22

23 As noted above, since compensatory and punitive damages are not available, the sole
24 remedy for plaintiff's retaliation claims pursuant to the ADA is equitable relief. Under the
25 mandate of *Cox*, because plaintiff's sole remedy under his ADA retaliation claim is equitable,
26 plaintiff is not entitled to a jury trial on that claim. Accordingly, defendant's motion to strike
27 [the demand for jury trial] is granted.
28

29 The *Sabbrese* court noted that "[n]either the court nor any of the parties were able to locate
30 any decisions in which the United States Court of Appeals for the Third Circuit implicitly upheld an
31 award of compensatory or punitive damages for ADA retaliation claims." It should be noted that
32 courts in other circuits have found that damages (and a right to jury trial) are available in retaliation
33 actions under the ADA. *See, e.g., Foster v. Time Warner Entertainment Co.*, 250 F.3d 1189 (8th Cir.
34 2001); *Lovejoy-Wilson v. Noco Motor Fuels, Inc.*, 242 F.Supp.2d 236 (W.D.N.Y. 2003) (citing
35 cases).
36

37 A pattern instruction for retaliation actions under the ADA is included here for two reasons.
38 First, the Third Circuit has not yet considered whether there is a right to jury trial in ADA retaliation
39 actions, and other courts are in disagreement on the question. Second, even if it is determined that
40 there is no right to jury trial for ADA retaliation claims, the parties or the court may wish to have a
41 jury render an advisory verdict on a plaintiff's ADA retaliation claim. *See* Fed. R.Civ.P. 39(c).
42 Alternatively, the parties may wish to stipulate to a jury's resolution of a retaliation claim. Use of an
43 advisory or a stipulated jury may especially be useful in cases where a retaliation claim is joined with

1 an ADA disparate treatment or accommodation claim, as there is a right to jury trial for those claims
2 and many of the issues to be decided by the jury for those claims might overlap with the retaliation
3 claim.

4 5 *The Basics of a Retaliation Claim under the ADA* 6

7 The ADA provides: "No person shall discriminate against any individual because such
8 individual has opposed any act or practice made unlawful by [the ADA] or because such individual
9 made a charge . . . under [the ADA]." 42 U.S.C. § 12203(a). "Thus, it is unlawful for an employer to
10 retaliate against an employee based upon the employee's opposition to anything that is unlawful
11 under the ADA." *Shellenberger v. Summit Bancorp, Inc.*, 318 F.3d 183, 188 (3d Cir. 2003).
12

13 Unlike a claim for discrimination, accommodation or harassment, an ADA retaliation claim
14 does not require that a plaintiff show that he or she is "disabled" within the meaning of the ADA.
15 *Shellenberger, v. Summit Bancorp, Inc.*, 318 F.3d 183, 188 (3d Cir. 2003) ("we note that
16 Shellenberger's failure to establish that she was disabled does not prevent her from recovering if she
17 can establish that her employer terminated her because she engaged in activity protected under the
18 ADA."). This is because the text of the ADA retaliation provision protects "any individual" who has
19 opposed any act or practice made unlawful by the ADA or who has made a charge under the ADA.
20 This differs from the scope of the ADA disability discrimination provision, 42 U.S.C. § 12112(a),
21 which may be invoked only by a "qualified individual with a disability."
22

23 *Protected Activity* 24

25 Activity protected from retaliation under the ADA includes not only bringing or participating
26 in formal actions to enforce ADA rights, but also informal activity such as requesting an
27 accommodation for a disability. *Shellenberger, v. Summit Bancorp, Inc.*, 318 F.3d 183, 188 (3d Cir.
28 2003). The plaintiff must have had a good faith belief in the merits of an accommodation request in
29 order for the activity to be protected against retaliation. *Id.* ("the protection from retaliation afforded
30 under the ADA does not extend to an employee whose request is motivated by something other than
31 a good faith belief that he/she needs an accommodation"). *See also Sulima v. Tobyhanna Army*
32 *Depot*, 602 F.3d 177, 189 (3d Cir. 2010) ("Sulima could not have had a good faith belief that these
33 side effects were anything but temporary, and therefore he could not have had a good faith belief that
34 he was disabled within the meaning of the ADA.").
35

36 *Standard for Actionable Retaliation* 37

38 The Supreme Court in *Burlington N. & S.F. Ry. v. White*, 126 S.Ct. 2405, 2415 (2006), held
39 that a cause of action for retaliation under Title VII lies whenever the employer responds to protected
40 activity in such a way "that a reasonable employee would have found the challenged action materially
41 adverse, which in this context means it well might have dissuaded a reasonable worker from making
42 or supporting a charge of discrimination." (citations omitted). The Court elaborated on this standard
43 in the following passage:

1
2 We speak of *material* adversity because we believe it is important to separate
3 significant from trivial harms. Title VII, we have said, does not set forth "a general civility
4 code for the American workplace." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S.
5 75, 80, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998). An employee's decision to report
6 discriminatory behavior cannot immunize that employee from those petty slights or minor
7 annoyances that often take place at work and that all employees experience. See 1 B.
8 Lindemann & P. Grossman, *Employment Discrimination Law* 669 (3d ed. 1996) (noting that
9 "courts have held that personality conflicts at work that generate antipathy" and "'snubbing'
10 by supervisors and co-workers" are not actionable under § 704(a)). The anti-retaliation
11 provision seeks to prevent employer interference with "unfettered access" to Title VII's
12 remedial mechanisms. It does so by prohibiting employer actions that are likely "to deter
13 victims of discrimination from complaining to the EEOC," the courts, and their employers.
14 And normally petty slights, minor annoyances, and simple lack of good manners will not
15 create such deterrence. See 2 EEOC 1998 Manual § 8, p. 8-13.

16 We refer to reactions of a *reasonable* employee because we believe that the
17 provision's standard for judging harm must be objective. An objective standard is judicially
18 administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial
19 effort to determine a plaintiff's unusual subjective feelings. We have emphasized the need for
20 objective standards in other Title VII contexts, and those same concerns animate our decision
21 here. See, e.g., [*Pennsylvania State Police v.] Suders*, 542 U.S., at 141, 124 S. Ct. 2342, 159
22 L. Ed. 2d 204 (constructive discharge doctrine); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17,
23 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993) (hostile work environment doctrine).

24 We phrase the standard in general terms because the significance of any given act of
25 retaliation will often depend upon the particular circumstances. Context matters. . . . A
26 schedule change in an employee's work schedule may make little difference to many workers,
27 but may matter enormously to a young mother with school age children. A supervisor's
28 refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to
29 retaliate by excluding an employee from a weekly training lunch that contributes significantly
30 to the employee's professional advancement might well deter a reasonable employee from
31 complaining about discrimination. Hence, a legal standard that speaks in general terms
32 rather than specific prohibited acts is preferable, for an act that would be immaterial in some
33 situations is material in others.

34 Finally, we note that . . . the standard is tied to the challenged retaliatory act, not the
35 underlying conduct that forms the basis of the Title VII complaint. By focusing on the
36 materiality of the challenged action and the perspective of a reasonable person in the
37 plaintiff's position, we believe this standard will screen out trivial conduct while effectively
38 capturing those acts that are likely to dissuade employees from complaining or assisting in
39 complaints about discrimination.

40
41 126 S.Ct. at 2415 (some citations omitted).
42

1 The anti-retaliation provision of Title VII, construed by the Court in *White*, is substantively
2 identical to the ADA provision on retaliation, *supra*. This instruction therefore follows the guidelines
3 of the Supreme Court's decision in *White*.

4
5 *No Requirement That Retaliation Be Job-Related To Be Actionable*
6

7 The Supreme Court in *Burlington N. & S.F. Ry. v. White*, 126 S.Ct. 2405, 2413 (2006), held
8 that retaliation need not be job-related to be actionable under Title VII. In doing so, the Court
9 rejected authority from the Third Circuit (and others) requiring that the plaintiff suffer an adverse
10 employment action in order to recover for retaliation. The Court distinguished Title VII's retaliation
11 provision from its basic anti-discrimination provision, which does require an adverse employment
12 action. The Court noted that unlike the basic anti-discrimination provision, which refers to
13 conditions of employment, the anti-retaliation provision is broadly worded to prohibit *any*
14 discrimination by an employer in response to protected activity.

15
16 Because the ADA anti-retaliation provision is substantively identical to the Title VII
17 provision construed in *White* — it broadly prohibits discrimination without reference to employment-
18 related decisions — this instruction contains bracketed material to cover a plaintiff's claim for
19 retaliation that is not job-related. For further discussion of *White*, see the Comment to Instruction
20 5.1.7.

21
22 *Time Period Between Protected Activity and the Allegedly Retaliatory Action*
23

24 On the relevance of the length of time between protected activity and an alleged retaliatory
25 act, *see Williams v. Philadelphia Housing Auth. Police Dept.*, 380 F.3d 751, 757 (3d Cir. 2004), a
26 case involving termination:

27
28 We have held in the ADA retaliation context that "temporal proximity between the
29 protected activity and the termination [can be itself] sufficient to establish a causal link."
30 *Shellenberger, v. Summit Bancorp, Inc.*, 318 F.3d 183, 188 (3d Cir. 2003) (quoting *Woodson*
31 *v. Scott Paper Co.*, 109 F.3d 913, 920 (3d Cir.1997)). However, "the timing of the alleged
32 retaliatory action must be unusually suggestive of retaliatory motive before a causal link will
33 be inferred." *Shellenberger*, 318 F.3d at 189 n.9. For example, two days between the
34 protected activity engaged in and the alleged retaliation sufficed in *Jalil v. Avdel Corp.*, 873
35 F.2d 701, 708 (3d Cir.1989), to support an inference of a causal connection between the two.
36 Similarly, in *Shellenberger*, comments made by a supervisor suggesting retaliation ten days
37 before termination, along with other evidence of retaliation, were sufficient to establish a
38 *prima facie* showing of causation.

39
40 Here, over two months elapsed between the time Williams requested a radio room
41 assignment and the time that he was terminated. In cases like this one, "where 'the temporal
42 proximity is not so close as to be unduly suggestive,' we have recognized that 'timing plus
43 other evidence may be an appropriate test. . .'" *Thomas v. Town of Hammonton*, 351 F.3d

108, 114 (3d Cir. 2003) (quoting *Estate of Smith v. Marasco*, 318 F.3d 497, 513 (3d Cir. 2003)). Williams has, however, put forth no other evidence suggesting that PHA terminated him because he requested a radio room assignment. Moreover, the evidence supporting PHA's alternative explanation is quite compelling. As Williams acknowledges, PHA had granted Williams medical leave on two prior occasions, and there was no indication that PHA would not have done so again had Williams simply [followed company procedures].

Protection Against Retaliation For the Protected Activity of Another Person Under the ADA

In *Fogleman v. Mercy Hospital, Inc.*, 283 F.3d 561, 562 (3d Cir. 2002), the plaintiff was employed in the same facility as his father. His father engaged in protected activity under the ADA, and the plaintiff alleged that the employer retaliated against the plaintiff. The court held that the plaintiff's third-party retaliation claim could proceed under 42 U.S.C. § 12203(b), which provides:

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

In a case involving a third-party retaliation claim, the instruction can be modified to accord with the holding in *Fogleman*. For a discussion of third-party retaliation claims under Title VII and *Thompson v. North American Stainless, LP*, 131 S. Ct. 863 (2011), see Comment 5.1.7.

Perceived Protected Activity

The court in *Fogleman* also held that the ADA protected an employee against retaliation for "perceived" protected activity. "Because the statutes forbid an employer's taking adverse action against an employee for discriminatory reasons, it does not matter whether the factual basis for the employer's discriminatory animus was correct and that, so long as the employer's specific intent was discriminatory, the retaliation is actionable." 283 F.3d at 562. If the fairly unusual case arises in which the employer is alleged to have retaliated for perceived rather than actual protected activity, then the instruction can be modified consistently with the court's directive in *Fogleman*.

"Determinative Effect" Instruction

Instruction 9.1.7 requires the plaintiff to show that the plaintiff's protected activity had a "determinative effect" on the allegedly retaliatory activity. A distinction between pretext and mixed-motive cases has on occasion been recognized as relevant for both Title VII retaliation claims and ADA retaliation claims: "[W]e analyze ADA retaliation claims under the same framework we employ for retaliation claims arising under Title VII.... This framework will vary depending on whether the suit is characterized as a 'pretext' suit or a 'mixed motives' suit." *Krouse v. American Sterilizer Co.*, 126 F.3d 494, 500 (3d Cir. 1997). For Title VII retaliation claims that proceed on a "pretext" theory, the "determinative effect" standard applies. See *Woodson*, 109 F.3d at 935 (holding

1 that it was error, in a case that proceeded on a “pretext” theory, not to use the “determinative effect”
2 language). The same is true for ADA retaliation claims. See *Krouse*, 126 F.3d at 501. Writing in an
3 ADA retaliation case that proceeded on a pretext theory, and citing *Woodson* and *Krouse*, the court
4 of appeals stated in *Shaner v. Synthes*, 204 F.3d 494, 501 (3d Cir. 2000), that “[w]e recently have
5 made clear that a plaintiff’s ultimate burden in a retaliation case is to convince the factfinder that
6 retaliatory intent had a ‘determinative effect’ on the employer’s decision.” *Shaner* does not appear,
7 however, to foreclose the use of a mixed-motive framework in an appropriate case, because the court
8 of appeals has more recently held that an ADA retaliation plaintiff had sufficient evidence to justify
9 the use of such a framework: “The evidentiary framework of Shellenberger’s claim will vary
10 depending on whether the suit is characterized as a ‘pretext’ suit or a ‘mixed-motives’ suit.
11 Shellenberger argues that her evidence was sufficient to survive judgment as a matter of law under
12 either theory, and we agree.” *Shellenberger v. Summit Bancorp, Inc.*, 318 F.3d 183, 187 (3d Cir.
13 2003) (footnote omitted).

14
15 In *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009), the Supreme Court rejected
16 the use of a mixed-motive framework for claims under the Age Discrimination in Employment Act
17 (ADEA). The *Gross* Court reasoned that it had never held that the mixed-motive framework set by
18 *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), applied to ADEA claims; that the ADEA’s
19 reference to discrimination “because of” age indicated that but-for causation is the appropriate test;
20 and that this interpretation was bolstered by the fact that when Congress in 1991 provided the
21 statutory mixed-motive framework codified at 42 U.S.C. § 2000e-5(g)(2)(B), that provision was not
22 drafted so as to cover ADEA claims. The Committee has not attempted to determine what, if any,
23 implications *Gross* has for ADA retaliation claims, but users of these instructions may wish to
24 consider that question.

9.2.1 ADA Definitions — Disability

Model

Under the ADA, the term “disability” means a [physical/mental] impairment that “substantially limits” a “major life activity.” I will now define some of these terms in more detail. Again, I remind you to consider the specific definitions I give you, and not to use your own opinions as to what these terms mean.

[“Physical/Mental Impairment”

The term “physical impairment” means any condition that prevents the body from functioning normally. The term “mental impairment” means any condition that prevents the mind from functioning normally.]

[Major Life Activities

Under the ADA, the term “disability” includes a [physical/mental] impairment that substantially limits a major life activity. Major life activities are activities that are of central importance to everyday life. Major life activities include the operation of major bodily functions. I instruct you that [describe activity] is a major life activity within the meaning of the ADA.]

[“Substantially Limiting”

Under the ADA, an impairment “substantially limits” a person’s ability to [describe relevant major life activity] if it prevents or restricts him from [relevant activity] compared to the average person in the general population.

To decide if [plaintiff’s] [alleged] impairment substantially limits [plaintiff’s] ability to [relevant activity], you should consider the nature of the impairment and how severe it is, how long it is expected to last, and its expected long-term impact.

[If you find that [plaintiff’s] impairment is a substantial limitation, it does not matter that it can be corrected by the use of such devices as a hearing aid, medication, or prosthetics. [You may, however, consider whether [plaintiff’s] eyesight could be corrected by the use of ordinary eyeglasses or contact lenses.]].

Only impairments with a permanent or long-term impact are disabilities under the ADA. Temporary injuries and short-term impairments are not disabilities. [Even so, some disabilities are permanent, but only appear from time to time. For example, if a person has a mental or physical disease that usually is not a problem, but flares up from time to time, that can be a disability if it

1 would substantially limit a major life activity when active.]

2
3 [If you find that [plaintiff's] impairment substantially limits one major life activity, you must
4 find that it is a disability even if it does not limit any other major life activity.]

5
6 The name of the impairment or condition is not determinative. What matters is the specific
7 effect of an impairment or condition on the life of [plaintiff].]

8
9
10 **[For use when there is a jury question on whether plaintiff is “regarded as” disabled:**

11
12 The ADA’s definition of “disability” includes not only those persons who are actually
13 disabled, but also those who are “regarded as” having a disability by their employer. The reason for
14 this inclusion is to protect employees from being stereotyped by employers as unable to perform
15 certain activities when in fact they are able to do so. [Plaintiff] is “regarded as” disabled within the
16 meaning of the ADA if [he/she] proves any of the following by a preponderance of the evidence:
17 *[Instruct on any alternative supported by the evidence]*

18
19 1. [Plaintiff] had a physical or mental impairment that did not substantially limit
20 [his/her] ability to perform [describe activity], but was treated by [defendant] as having an
21 impairment that did so limit [his/her] ability to perform the activity; or

22
23 2. [Plaintiff] had an impairment that was substantially limiting in [his/her] ability to
24 perform [describe activity] only because of the attitudes of others toward the impairment; or

25
26 3. [Plaintiff] did not have any impairment, but [defendant] treated [him/her] as
27 having an impairment that substantially limited [plaintiff's] ability to perform [describe
28 activity].

29
30 Also, [Plaintiff] can meet the requirement of being “regarded as” disabled if [he/she] was
31 discriminated against because of an actual or perceived impairment, even if the impairment did not,
32 or was not perceived to, limit a major life activity.”

33
34 [However, [plaintiff] cannot be “regarded as” disabled if [his/her] impairment is temporary
35 and minor. Under the ADA, a temporary impairment is one with an actual or expected duration of six
36 months or less.]]

37
38
39 **[For use when there is a jury question on whether plaintiff has a record of disability:**

40
41 The ADA definition of “disability” includes not only those persons who persons who are
42 actually disabled, but also those who have a “a record of disability.” [Plaintiff] has a “record of
43 disability” if [he/she] proves by a preponderance of the evidence that [he/she] has a record of a

1 “physical or mental impairment” that “substantially limited” [his/her] ability to perform a [describe
2 activity], as I have defined those terms for you. [This means that if [plaintiff] had a disability within
3 the meaning of the ADA [but has now recovered] [but that disability is in remission], [he/she] still
4 fits within the statutory definition because [he/she] has a record of disability.]
5
6

7 **Concluding Instruction:**

8

9 Please keep in mind that the definition of “disability” is to be construed in favor of broad
10 coverage of individuals. The primary question for you to decide is whether [defendant] has complied
11 with its obligations under the ADA.
12
13

14 **Comment**

15

16 The ADA definition of “disability” is complex for a number of reasons: 1) there are three
17 separate types of disability: “actual”, “regarded as”, and “record of” disability; 2) the basic definition
18 of “disability” encompasses three separate subdefinitions, for “impairment”, “substantially limited”
19 and “major life activity”; 3) perhaps most important, the technical definition of “disability” is likely
20 to be different from the term as it is used in the vernacular by most jurors. In most cases, however,
21 the instruction can be streamlined because not every aspect of the definition will be disputed in the
22 case. For example, ordinarily there will be no jury question on whether what the plaintiff suffers
23 from is an impairment.
24

25 *ADA Amendments Act of 2008*

26

27 The ADA Amendments Act of 2008 (P.L. 110-325, 122 Stat. 3555) (the “Act”) made a
28 number of changes to the ADA definition of disability, and statutorily overruled some Supreme
29 Court cases that Congress determined had “narrowed the broad scope of protection intended to be
30 afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to
31 protect.” The basic thrust of the Act is to make it easier for plaintiffs to prove that they are
32 “disabled” within the meaning of the ADA. For example, section 2(b)(5) of the Act provides that “it
33 is the intent of Congress that the primary object of attention in cases brought under the ADA should
34 be whether entities covered under the ADA have complied with their obligations,” and that “the
35 question of whether an individual’s impairment is a disability under the ADA should not demand
36 extensive analysis.” Along the same lines, section 4(a) of the Act provides that the definition of
37 “disability” under the ADA “shall be construed in favor of broad coverage of individuals.” The
38 concluding text of the Instruction implements these general provisions of the Act. In addition, the
39 Act makes specific changes to the statutory definition of “disability” that are discussed below in this
40 Comment.
41

42 *“Impairment”*

43

1 In *Bragdon v. Abbott*, 524 U.S. 624, 632 (1998), the Court determined that an employee with
2 HIV had a physical “impairment” within the meaning of the ADA. The Court noted that the pertinent
3 regulations interpreting the term “impairment” provide as follows:
4

5 (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss
6 affecting one or more of the following body systems: neurological; musculoskeletal; special
7 sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive,
8 genito-urinary; hemic and lymphatic; skin; and endocrine; or
9

10 (B) any mental or psychological disorder, such as mental retardation, organic brain
11 syndrome, emotional or mental illness, and specific learning disabilities.
12

13 45 CFR § 84.3(j)(2)(i) (1997).
14

15 The *Bragdon* Court noted that in issuing these regulations, “HEW decided against including a
16 list of disorders constituting physical or mental impairments, out of concern that any specific
17 enumeration might not be comprehensive.” The Court relied on the commentary accompanying the
18 regulations, which “contains a representative list of disorders and conditions constituting physical
19 impairments, including such diseases and conditions as orthopedic, visual, speech, and hearing
20 impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease,
21 diabetes, mental retardation, emotional illness, and . . . drug addiction and alcoholism.” After
22 reviewing these sources, the Court concluded that HIV did constitute an impairment within the
23 meaning of the ADA.
24

25 “[S]ide effects from medical treatment may themselves constitute an impairment under the
26 ADA.” *Sulima v. Tobyhanna Army Depot*, 602 F.3d 177, 187 (3d Cir. 2010). But in order for such
27 side effects to constitute an impairment, “it is not enough to show just that the potentially disabling
28 medication or course of treatment was prescribed or recommended by a licensed medical
29 professional. Instead ... the medication or course of treatment must be required in the ‘prudent
30 judgment of the medical profession,’ and there must not be an available alternative that is equally
31 efficacious that lacks similarly disabling side effects.” *Id.* (quoting *Christian v. St. Anthony Med.*
32 *Ctr.*, 117 F.3d 1051, 1052 (7th Cir. 1997)).
33

34 “Substantially Limits” 35

36 The Supreme Court has held that for impairment to “substantially limit” a major life activity,
37 it must “significantly restrict” the plaintiff as compared to the general population. The Court in
38 *Toyota Motor Mfg v. Williams*, 534 U.S. 184, 198 (2002), held that to fall within the definition of
39 “substantially limited” the plaintiff “must have an impairment that prevents or severely restricts the
40 individual from doing activities that are of central importance to most people's daily lives.” But the
41 ADA Amendments Act of 2008 specifically overrules *Toyota* and cases following it. Section
42 (2)(b)(4) and (5) describe the purposes of the Act as follows:
43

1 (4) to reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing,*
2 *Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), that the terms “substantially” and “major” in
3 the definition of disability under the ADA “need to be interpreted strictly to create a
4 demanding standard for qualifying as disabled,” and that to be substantially limited in
5 performing a major life activity under the ADA “an individual must have an impairment that
6 prevents or severely restricts the individual from doing activities that are of central
7 importance to most people's daily lives”;

8
9 (5) to convey congressional intent that the standard created by the Supreme Court in the case
10 of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) for
11 “substantially limits”, and applied by lower courts in numerous decisions, has created an
12 inappropriately high level of limitation necessary to obtain coverage under the ADA, to
13 convey that it is the intent of Congress that the primary object of attention in cases brought
14 under the ADA should be whether entities covered under the ADA have complied with their
15 obligations, and to convey that the question of whether an individual's impairment is a
16 disability under the ADA should not demand extensive analysis.

17
18 Furthermore, section 4(a)(4) of the Act provides that the term “substantially limits” “shall be
19 interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.”
20

21 Accordingly, the text of the Instruction does not include any restrictions on the term
22 “substantially limits” such as “severe” or “significant”; and the conclusion to the Instruction provides,
23 consistently with Congressional intent, that the statutory definition of “disability” (including the term
24 “substantially limits”) is to be construed broadly.⁸
25

26 *Use of Corrective Devices*

27

28 In *Sutton v. United Air Lines*, 527 U.S. 471, 482 (1999), the Court held that the existence of a
29 “disability” under the ADA must be determined in light of corrective measures used by the
30 employee—in that case, the use of eyeglasses to correct severely impaired vision. The Court declared
31 that “it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental
32 impairment, the effect of those measures— both positive and negative— must be taken into account
33 when judging whether that person is ‘substantially limited’ in a major life activity and thus ‘disabled’
34 under the Act.” But the ADA Amendments Act of 2008 specifically repudiates the result in *Sutton*.⁹

⁸ In a case involving events that occurred prior to the enactment of the ADA Amendments Act of 2008, the Court of Appeals held that inability to drive at night is relevant to the question whether monocular vision substantially limits the major life activity of seeing. See *Colwell v. Rite Aid Corp.*, 602 F.3d 495, 502 (3d Cir. 2010).

⁹ “The resulting statutory section only prohibits the consideration of *ameliorative* mitigatory measures, and does not address potentially negative side effects of medical treatment.” *Sulima v. Tobyhanna Army Depot*, 602 F.3d 177, 186 n.3 (3d Cir. 2010).

1 Section (4)(a)(E) of the Act provides that the determination of whether an impairment substantially
2 limits a major life activity “shall be made without regard to the ameliorative effects of mitigating
3 measures such as –

4
5 (I) medication, medical supplies, equipment, or appliances, low-vision devices
6 (which do not include ordinary eyeglasses or contact lenses), prosthetics including
7 limbs and devices, hearing aids and cochlear implants or other implantable hearing
8 devices, mobility devices, or oxygen therapy equipment and supplies;

9
10 (II) use of assistive technology;

11
12 (III) reasonable accommodations or auxiliary aids or services; or

13
14 (IV) learned behavioral or adaptive neurological modifications.

15
16 The Act does provide, however, that the “ameliorative effects of the mitigating measures of ordinary
17 eyeglasses or contact lenses shall be considered in determining whether an impairment substantially
18 limits a major life activity.” The text of the Instruction contains a bracketed alternative on corrective
19 devices that comports with the Act.

20
21 *“Major Life Activity”*

22
23 The question of whether the plaintiff is substantially limited in performing a “major life
24 activity” is a question for the jury. *Williams v. Philadelphia Housing Auth. Police Dept.*, 380 F.3d
25 751, 7633d Cir. 2004) (“The question of whether an individual is substantially limited in a major life
26 activity is a question of fact.”). But whether a certain activity rises to the level of a “major life
27 activity” is usually treated as a legal question. For example, in *Bragdon v. Abbott*, 524 U.S. 624, 637
28 (1998), the Court held as a matter of law that reproduction is a major life activity within the meaning
29 of the ADA. Similarly the Third Circuit has held that a number of activities constitute major life
30 activities. *See, e.g., Gagliardo v. Connaught Laboratories, Inc.*, 311 F.3d 565, 573 (3d Cir. 2002)
31 (concentrating and remembering are major life activities); *Taylor v. Phoenixville School Dist.*, 184
32 F.3d 296, 305 (3d Cir. 1999) (holding that thinking is a major life activity, as it is “inescapably
33 central to anyone's life”). Accordingly, the instruction does not leave to the jury the determination of
34 whether the plaintiff's claimed impairment is one that affects a major life activity. Rather, the jury
35 must decide whether the plaintiff is substantially limited in performing the major life activity found
36 to be at issue by the court.

37
38 An activity need not be related to employment to constitute a “major life activity.” Thus in
39 *Bragdon v. Abbott*, 524 U.S. 624, 637 (1998), the Court held that reproduction was a “major life
40 activity” within the meaning of the ADA (and the Rehabilitation Act). The employer argued that
41 Congress intended the ADA only to cover those aspects of a person's life that have a public,
42 economic, or daily character. But the Court declared that nothing in the ADA's statutory definition
43 “suggests that activities without a public, economic, or daily dimension may somehow be regarded as

1 so unimportant or insignificant as to fall outside the meaning of the word ‘major.’”

2
3 The ADA Amendments Act of 2008 sets forth a number of activities, and bodily functions,
4 that constitute “major life activities” within the meaning of the ADA. Section 4(a) of the Act
5 provides the following definition of “major life activities”:
6

7 (A) In general. * * * major life activities include, but are not limited to, caring for oneself,
8 performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting,
9 bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and
10 working.
11

12 (B) Major bodily functions. * * * a major life activity also includes the operation of a major
13 bodily function, including but not limited to, functions of the immune system, normal cell
14 growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and
15 reproductive functions.
16

17 *Work as a Major Life Activity* 18

19 The Supreme Court has expressed unease with the concept of working as a major life activity
20 under the ADA. In *Sutton v. United Air Lines*, 527 U.S. 471, 492 (1999), the Court noted that “there
21 may be some conceptual difficulty in defining ‘major life activities’ to include work, for it seems to
22 argue in a circle to say that if one is excluded, for instance, by reason of an impairment, from
23 working with others then that exclusion constitutes an impairment, when the question you're asking
24 is, whether the exclusion itself is by reason of handicap.” The *Sutton* Court assumed without
25 deciding that working was a major life activity. It declared, however, that if the major life activity at
26 issue is working, then the plaintiff would have to show an inability to work in a “broad range of
27 jobs,” rather than a specific job.
28

29 The ADA Amendments Act of 2008 specifically lists “working” as a major life activity, and
30 imposes no special showing on “working” as distinct from other life activities. Nothing in the Act
31 requires the plaintiff to prove an inability to perform a broad range of jobs, as had been required by
32 *Sutton*. Moreover, one of the major purposes of the Act is to reject the “holdings” of *Sutton* on the
33 ground that the case “narrowed the broad scope of protection intended to be afforded by the ADA.”
34 Accordingly, the Instruction contains no special provision or limitation on proof of working as a
35 major life activity.
36

37 *“Regarded as” Disabled* 38

39 The rationale behind “regarded as” disability was described by the Third Circuit in *Deane v.*
40 *Pocono Medical Center*, 142 F.3d 138, 143 n.5 (3d Cir. 1998) (en banc):
41

42 With the “regarded as” prong, Congress chose to extend the protections of the ADA to
43 individuals who have no actual disability. The primary motivation for the inclusion of

1 misperceptions of disabilities in the statutory definition was that society's accumulated myths
2 and fears about disability and diseases are as handicapping as are the physical limitations that
3 flow from actual impairment.
4

5 The *Deane* court emphasized that the plaintiff does not need to show that the employer acted
6 with bad intent in regarding the plaintiff as disabled:
7

8 Although the legislative history indicates that Congress was concerned about eliminating
9 society's myths, fears, stereotypes, and prejudices with respect to the disabled, the EEOC's
10 Regulations and Interpretive Guidance make clear that even an innocent misperception based
11 on nothing more than a simple mistake of fact as to the severity, or even the very existence,
12 of an individual's impairment can be sufficient to satisfy the statutory definition of a
13 perceived disability. See 29 C.F.R. pt. 1630, app. § 1630.2(l) (describing, as one example of
14 a "regarded as" disabled employee, an individual with controlled high blood pressure that is
15 not substantially limiting, who nonetheless is reassigned to less strenuous work because of
16 the employer's unsubstantiated fear that the employee will suffer a heart attack). Thus,
17 whether or not PMC was motivated by myth, fear or prejudice is not determinative of
18 Deane's "regarded as" claim.
19

20 142 F.3d at 144. Nor is "regarded as" disability dependent on plaintiff having any impairment. The
21 question is not the plaintiff's actual condition, but whatever condition was perceived by the
22 employer. See *Kelly v. Drexel University*, 94 F.3d 102, 108 (3d Cir. 1996) ("Our analysis of this
23 ["regarded as"] claim focuses not on Kelly and his actual abilities but on the reactions and
24 perceptions of the persons interacting or working with him.").
25

26 In section 4 of the ADA Amendments Act of 2008, Congress clarified two points about
27 "regarded as" disability:
28

29 1. A plaintiff meets the requirement of being "regarded as" disabled if she establishes that she
30 has been discriminated against "because of an actual or perceived impairment *whether or not*
31 *the impairment limits or is perceived to limit a major life activity.*" (emphasis added).
32

33 2. A plaintiff cannot be "regarded as" disabled if the actual or perceived impairment is
34 "transitory and minor." A "transitory" impairment is defined as one "with an actual or
35 expected duration of 6 months or less."
36

37 The text of the Instruction is intended to incorporate these statutory clarifications.
38

39 The mere fact that the employer offered an accommodation does not mean that the employee
40 was "regarded as" disabled. *Williams v. Philadelphia Housing Auth.*, 380 F.3d 751, 773 n.20 (3d Cir.
41 2004):
42

43 Williams argues, inter alia, that PHA "admitted" he was disabled within the meaning

1 of the ADA by offering him the opportunity to take an unpaid leave of absence, thereby
2 "accommodating" him. We agree with the Sixth and Ninth Circuits, however, that an offer of
3 accommodation does not, by itself, establish that an employer "regarded" an employee as
4 disabled. See *Thornton v. McClatchy Newspapers, Inc.*, 261 F.3d 789, 798 (9th Cir. 2001)
5 ("When an employer takes steps to accommodate an employee's restrictions, it is not thereby
6 conceding that the employee is disabled under the ADA or that it regards the employee as
7 disabled. A contrary rule would discourage the amicable resolution of numerous employment
8 disputes and needlessly force parties into expensive and time-consuming litigation."),
9 clarified in other respects, 292 F.3d 1045 (9th Cir. 2002); *Plant v. Morton Int'l, Inc.*, 212
10 F.3d 929, 938 (6th Cir. 2000) ("The intent behind this ["regarded as"] provision, according to
11 the EEOC, is to reach those cases in which 'myths, fears and stereotypes' affect the
12 employer's treatment of an individual. [An employee] cannot show that this provision applies
13 to him merely by pointing to that portion of the record in which his [employer] admitted that
14 he was aware of [the employee's] medical restrictions and modified [the employee's]
15 responsibilities based on them.").

16
17 *Reasonable Accommodation Requirement as Applied to "Regarded as" Disability*

18
19 In *Williams v. Philadelphia Housing Auth.*, 380 F.3d 751, 770 (3d Cir. 2004), the employer
20 argued that it had no obligation to provide a reasonable accommodation to an employee it "regarded
21 as" disabled because there was no job available that would accommodate the perceived
22 disability—that is, the defendant regarded the employee as completely unable to do any job at all. The
23 court described the employer's argument, and rejected it, in the following passage:

24
25 To the extent Williams relies upon a "regarded as" theory of disability, PHA contends that a
26 plaintiff in Williams's position must show that there were vacant, funded positions whose essential
27 functions the employee was capable of performing *in the eyes of the employer who misperceived the*
28 *employee's limitations*. Even if a trier of fact concludes that PHA wrongly perceived Williams's
29 limitations to be so severe as to prevent him from performing any law enforcement job, the "regarded
30 as" claim must, in PHA's view, fail because Williams has been unable to demonstrate the existence
31 of a vacant, funded position at PHA whose functions he was capable of performing in light of its
32 misperception. . . . PHA's argument, if accepted, would make "regarded as" protection meaningless.
33 An employer could simply regard an employee as incapable of performing any work, and an
34 employee's "regarded as" failure to accommodate claim would always fail, under PHA's theory,
35 because the employee would never be able to demonstrate the existence of any vacant, funded
36 positions he or she was capable of performing in the eyes of the employer. . . . Thus, contrary to
37 PHA's suggestion, a "regarded as" disabled employee need not demonstrate during litigation the
38 availability of a position he or she was capable of performing in the eyes of the misperceiving
39 employer. . . .

40
41 The employer in *Williams* made an alternative argument: that if an employee is "regarded as"
42 but not actually disabled, the employer should have no duty to provide a reasonable accommodation
43 because there is nothing to accommodate. In *Williams*, the plaintiff was a police officer and the

1 employer regarded him as being unable to be around firearms because of a mental impairment. The
2 court analyzed the defendant's argument that it had no duty to provide an accommodation to an
3 employee "regarded as" disabled, and rejected it, in the following passage:

4
5 PHA . . . suggests that Williams, by being "regarded as" disabled by PHA, receives a
6 "windfall" accommodation compared to a similarly situated employee who had not been
7 "regarded as" disabled and would not be entitled under the ADA to any accommodation. The
8 record in this case demonstrates that, absent PHA's erroneous perception that Williams could
9 not be around firearms because of his mental impairment, a radio room assignment would
10 have been made available to him and others similarly situated. PHA refused to provide that
11 assignment solely based upon its erroneous perception that Williams's mental impairment
12 prevented him not only from carrying a gun, but being around others with, or having access
13 to, guns - perceptions specifically contradicted by PHA's own psychologist. While a similarly
14 situated employee who was not perceived to have this additional limitation would have been
15 allowed a radio room assignment, Williams was specifically denied such an assignment
16 because of the erroneous perception of his disability. The employee whose limitations are
17 perceived accurately gets to work, while Williams is sent home unpaid. This is precisely the
18 type of discrimination the "regarded as" prong literally protects from Accordingly,
19 Williams, to the extent PHA regarded him as disabled, was entitled to reasonable
20 accommodation

21
22 Thus, an employee "regarded as" having a disability is entitled to the same accommodation that he
23 would receive were he actually disabled.

24
25 *Record of disability*

26
27 For a discussion of "record of" disability claims, see *Eshelman v. Agere Systems, Inc.*, 554
28 F.3d 426, 436-39 (3d Cir. 2009).

9.2.2 ADA Definitions — Qualified Individual

Model

Under the ADA, [plaintiff] must establish that [he/she] was a “qualified individual.” This means that [plaintiff] must show that [he/she] had the skill, experience, education, and other requirements for the [describe job] and could do the job’s “essential functions”, either with or without [describe requested accommodation]. If [plaintiff] cannot establish that [he/she] is qualified to perform the essential functions of [describe job] even with a [describe accommodation], then [plaintiff] is not a qualified individual under the ADA. If [plaintiff] is not a qualified individual within the meaning of the ADA, you must return a verdict for [defendant], even if the reason [plaintiff] is not qualified is solely as a result of [his/her] disability. The ADA does not require an employer to hire or retain an individual who cannot perform the job with or without an accommodation.

In this case, [plaintiff] claims that [he/she] was able to perform the essential functions of [describe job] [with [describe accommodation]]. [Defendant] contends that [plaintiff] was unable to perform [describe function(s)] and that [this/these] function(s) were essential to the [describe job]. It is [plaintiff’s] burden to prove by a preponderance of the evidence that [he/she] was able to perform the essential functions of [describe job]. If [plaintiff] could not perform [describe function] then it is [plaintiff’s] burden to show that [describe function], that this was not essential to the [describe job].

In determining whether [plaintiff] could perform the essential functions of [describe job], you should keep in mind that not all job functions are “essential.” The term “essential functions” does not include the marginal functions of the position. Essential functions are a job’s fundamental duties. In deciding whether [describe function] is essential to [describe job], some factors you may consider include the following:

- 1) whether the performance of the [describe function] is the reason that the [describe job] exists;
- 2) the amount of time spent on the job performing [describe function];
- 3) whether there are a limited number of employees available to do the [describe function];
- 4) whether [describe function] is highly specialized;
- 5) whether an employee in the [describe job] is hired for his or her expertise or ability to [describe function];
- 6) [defendant’s] judgment about what functions are essential to the [describe job];

1 7) written job descriptions for the [describe job] ;

2
3 8) the consequences of not requiring an employee to [describe function] in a satisfactory
4 manner;

5
6 9) whether others who held the position of [describe job] performed [describe function];

7
8 10) the terms of a collective bargaining agreement;

9
10 11) *[list any other factors supported by the evidence.]*

11
12 No one factor is necessarily controlling. You should consider all of the evidence in deciding
13 whether [describe function] is essential to [describe job].

14
15 [In addition to specific job requirements, an employer may have general requirements for all
16 employees. For example, an employer may expect employees to refrain from abusive or threatening
17 conduct toward others, or may require a regular level of attendance. These may be considered
18 essential functions of any job.]

19
20 In assessing whether [plaintiff] was qualified to perform the essential functions of [describe
21 job] you should consider [plaintiff's] abilities as they existed at the time when [describe challenged
22 employment action].

23 24 25 **Comment**

26
27 Under the ADA, only a "qualified individual" is entitled to recover for disparate treatment or
28 failure to provide a reasonable accommodation. A "qualified individual" is one "who, with or
29 without reasonable accommodation, can perform the essential functions of the employment position
30 that such individual holds or desires." 42 U.S.C. § 12111(8).

31
32 The Third Circuit set forth the basic approach to determining whether a plaintiff is a
33 "qualified individual" in *Deane v. Pocono Medical Center*, 142 F.3d 138, 145-146 (3d Cir. 1998) (en
34 banc):

35
36 [T]he ADA requires [plaintiff] to demonstrate that she is a "qualified individual". The ADA
37 defines this term as an individual "who, with or without reasonable accommodation, can
38 perform the essential functions of the employment position that such individual holds or
39 desires." 42 U.S.C. § 12111(8). The Interpretive Guidance to the EEOC Regulations divides
40 this inquiry into two prongs. First, a court must determine whether the individual satisfies the
41 requisite skill, experience, education and other job-related requirements of the employment
42 position that such individual holds or desires. See 29 C.F.R. pt. 1630, app. § 1630.2(m).
43 Second, it must determine whether the individual, with or without reasonable

1 accommodation, can perform the essential functions of the position held or sought. . . .

2
3 Determining whether an individual can, with or without reasonable accommodation,
4 perform the essential functions of the position held or sought, also a two step process, is
5 relatively straightforward. First, a court must consider whether the individual can perform the
6 essential functions of the job without accommodation. If so, the individual is qualified (and,
7 a fortiori, is not entitled to accommodation). If not, then a court must look to whether the
8 individual can perform the essential functions of the job with a reasonable accommodation. If
9 so, the individual is qualified. If not, the individual has failed to set out a necessary element
10 of the prima facie case.

11
12 The court in *Deane* emphasized that the plaintiff need not prove the ability to perform *all* the
13 functions of the job requested:

14
15 Section 12111(8) is plain and unambiguous. The first sentence of that section, makes
16 it clear that the phrase "with or without reasonable accommodation" refers directly to
17 "essential functions". Indeed, there is nothing in the sentence, other than "essential
18 functions", to which "with or without reasonable accommodation" could refer. Moreover,
19 nowhere else in the Act does it state that, to be a "qualified individual", an individual must
20 prove his or her ability to perform all of the functions of the job, and nowhere in the Act does
21 it distinguish between actual or perceived disabilities in terms of the threshold showing of
22 qualifications. Therefore, if an individual can perform the essential functions of the job
23 without accommodation as to those functions, regardless of whether the individual can
24 perform the other functions of the job (with or without accommodation), that individual is
25 qualified under the ADA.

26
27 142 F.3d at 146-47.

28
29 "*Essential Functions*" of a Job

30
31 In *Skerski v. Time Warner Cable Co.*, 257 F.3d 273, 278 (3d Cir. 2001), the court provided an
32 extensive analysis of the meaning of the term "essential functions" of a job. The plaintiff in *Skerski*
33 was a cable installer technician, and he developed a fear of heights. One of the defendant's arguments
34 was that he was no longer qualified for the position because climbing was one of the "essential
35 functions" of the job of cable installer technician. The trial court agreed with the defendant, finding
36 as a matter of law that climbing was an essential job function, and therefore that plaintiff could not
37 recover because he could not perform that function even with an accommodation. The Third Circuit
38 began its analysis by looking at the relevant agency regulations:

39
40 A job's "essential functions" are defined in 29 C.F.R. § 1630.2(n)(1) as those that are
41 "fundamental," not "marginal." The regulations list several factors for consideration in
42 distinguishing the fundamental job functions from the marginal job functions, including: (1)
43 whether the performance of the function is "the reason the position exists;" (2) whether there

1 are a "limited number of employees available among whom the performance of that job
2 function can be distributed;" and (3) whether the function is "highly specialized so that the
3 incumbent in the position is hired for his or her expertise." 29 C.F.R. § 1630.2(n)(2). The
4 regulations further set forth a non-exhaustive list of seven examples of evidence that are
5 designed to assist a court in identifying the "essential functions" of a job. They include:
6

7 (i) The employer's judgment as to which functions are essential;

8
9 (ii) Written job descriptions prepared before advertising or interviewing applicants
10 for the job;

11
12 (iii) The amount of time spent on the job performing the function;

13
14 (iv) The consequences of not requiring the incumbent to perform the function;

15
16 (v) The terms of a collective bargaining agreement;

17
18 (vi) The work experience of past incumbents in the jobs; and/or

19
20 (vii) The current work experience of incumbents in similar jobs.
21

22
23 29 C.F.R. § 1630.2(n)(3).
24

25 As is apparent, "whether a particular function is essential is a factual determination
26 that must be made on a case by case basis." EEOC Interpretive Guidance on Title I of the
27 Americans with Disabilities Act, 29 C.F.R. pt. 1630, App. 1630.2(n) (2000) [hereafter
28 "EEOC Interpretive Guidance"]. It follows that none of the factors nor any of the evidentiary
29 examples alone are necessarily dispositive.
30

31 Applying these standards to the facts, the court found that the district court erred in
32 concluding as a matter of law that climbing was not an essential function for the position of cable
33 installer technician:
34

35 Looking to the three factors included in § 1630.2(n)(2), it is evident that two are not
36 present in this case as installer technicians are not hired solely to climb or even because of
37 their climbing expertise. On the other hand, [there] is evidence to suggest that Time Warner
38 employs a limited number of installer technicians in Skerski's work area-- only 7 or 8,
39 according to Skerski -- and that this small number hampers Time Warner's ability to allow
40 certain technicians to avoid climbing. The significance of this factor is pointed out in the
41 Interpretive Guidance to § 1630.2(n), which explains, "if an employer has a relatively small
42 number of available employees for the volume of work to be performed, it may be necessary
43 that each employee perform a multitude of different functions. Therefore, the performance of

1 those functions by each employee becomes more critical and the options for reorganizing the
2 work become more limited." EEOC Interpretive Guidance, 29 C.F.R. pt. 1630, App.
3 1630.2(n).

4
5 But this is only one of the three factors. Moreover, consideration of the seven
6 evidentiary examples included in § 1630.2(n)(3) suggests caution against any premature
7 determination on essential functions as at least some of them lean in Skerski's favor. Of
8 course, as required by § 1630.2(n)(3)(i), we owe some deference to Time Warner and its
9 own judgment that climbing is essential to the installer technician position. And the written
10 job descriptions, as the District Court noted, "clearly identify climbing as a job requirement."

11 However, describing climbing as a requirement is not necessarily the same as denominating
12 climbing as an essential function. In fact, the job descriptions prepared by both New
13 Channels and Time Warner list various duties and responsibilities under the heading
14 "Essential Functions," but neither identifies climbing as "essential." . . .

15
16 Among the facts and circumstances relevant to each case is, of course, the employee's
17 actual experience as well as that of other employees. See 29 C.F.R. § 1630.2(n)(3)(iv), (vi)
18 and (vii). It is undisputed that from the time Skerski began as an installer technician in 1982
19 until the time he was diagnosed with his panic disorder in 1993, a significant portion of his
20 job responsibilities required climbing. . . . However, for the three and a half years after his
21 diagnosis in which he continued to work as an installer technician, Skerski performed
22 virtually no overhead work at all. . . . Skerski testified at his deposition that there always was
23 enough underground work to do, that he always worked 40-hour weeks and even worked
24 enough to earn a couple thousand dollars per year in overtime, and that he had never
25 experienced problems at work because of his panic disorder until Hanning became his
26 supervisor in the fall of 1996. . . .

27
28 Skerski argues that his own experience exemplifies that no negative consequences
29 resulted from his failure to perform the climbing function of his job, which is another of the
30 illustrations listed in the regulations. See 29 C.F.R. § 1630.2(n)(3)(iv). However, there is
31 support in the record for Time Warner's contention that Skerski's inability to climb caused it
32 considerable administrative difficulties. . . . Hanning testified that Skerski's inability to
33 climb "made the routing process extremely cumbersome," because the assignment process
34 had to be done by hand instead of computer. He also claimed that Skerski's inability to climb
35 necessitated the hiring of outside contract labor to meet demand, and that Skerski was not
36 always as busy as he should have been due to his restricted work schedule.

37
38 The *Skerski* court found that the relevant factors cut both ways, so that the question of
39 whether climbing was an essential function of the cable installer technician position was a question
40 for the jury:

41
42 We do not suggest that the District Court here had no basis for its conclusion that
43 climbing is an essential function of Skerski's position as installer technician or even that, if

1 we were the triers of fact, we would not so hold. But upon reviewing the three factors listed
2 in 29 C.F.R. § 1630.2(n)(2) and the seven evidentiary examples provided by 29 C.F.R. §
3 1630.2(n)(3), it is apparent that a genuine issue of material fact exists as to whether climbing
4 is an essential function of the job of installer technician at Time Warner. Although the
5 employer's judgment and the written job descriptions may warrant some deference, Skerski
6 has put forth considerable evidence that contradicts Time Warner's assertions, particularly the
7 uncontradicted fact that following his 1993 diagnosis he worked for more than three years as
8 an installer technician for Time Warner without ever having to perform over head work.
9

10 *See also Walton v. Mental Health Assoc. of Southeastern Pennsylvania*, 168 F.3d 661, 666 (3d Cir.
11 1999) (employee's inability to appear in a promotional video because she was obese was not a
12 substantial limitation on essential function of a job; any such appearance would have been only a
13 minor aspect of her job); *Conneen v. MBNA America Bank, N.A.*, 334 F.3d 318, 327 (3d Cir. 2003)
14 (promptness was not an essential function merely because the employer thought it necessary for the
15 employee to set an example for lower-level employees).
16

17 The Third Circuit has held that whether a particular function is an "essential function" of a
18 job under the ADA is a question best left for the jury. *Turner v. Hershey Chocolate USA*, 440 F.3d
19 604, 613 (3d Cir. 2006).

9.2.3 ADA Definitions — Hostile or Abusive Work Environment

Model

In determining whether a work environment is "hostile" you must look at all of the circumstances, which may include:

- The total physical environment of [plaintiff's] work area.
- The degree and type of language and insult that filled the environment before and after [plaintiff] arrived.
- The reasonable expectations of [plaintiff] upon entering the environment.
- The frequency of the offensive conduct.
- The severity of the conduct.
- The effect of the working environment on [plaintiff's] mental and emotional well-being.
- Whether the conduct was unwelcome, that is, conduct [plaintiff] regarded as unwanted or unpleasant.
- Whether the conduct was pervasive.
- Whether the conduct was directed toward [plaintiff].
- Whether the conduct was physically threatening or humiliating.
- Whether the conduct was merely a tasteless remark.
- Whether the conduct unreasonably interfered with [plaintiff's] work performance.

Conduct that amounts only to ordinary socializing in the workplace, such as occasional horseplay, occasional use of abusive language, tasteless jokes, and occasional teasing, does not constitute an abusive or hostile work environment. A hostile work environment can be found only if there is extreme conduct amounting to a material change in the terms and conditions of employment. Moreover, isolated incidents, unless extremely serious, will not amount to a hostile work environment.

It is not enough that the work environment was generally harsh, unfriendly, unpleasant, crude or vulgar to all employees. In order to find a hostile work environment, you must find that [plaintiff] was harassed because of [his/her] disability [or request for accommodation]. The harassing conduct may, but need not be specifically directed at [plaintiff's] disability [or request for accommodation]. The key question is whether [plaintiff], as a person with [plaintiff's disability] was subjected to harsh employment conditions to which employees without a disability were not.

It is important to understand that, in determining whether a hostile work environment existed at the [employer's workplace] you must consider the evidence from the perspective of a reasonable person with [plaintiff's disability] in the same position. That is, you must determine whether a reasonable person with [plaintiff's disability] would have been offended or harmed by the conduct in question. You must evaluate the total circumstances and determine whether the alleged harassing behavior could be objectively classified as the kind of behavior that would seriously affect the psychological or emotional well-being of a reasonable person with [plaintiff's disability]. The

1 reasonable person with [plaintiff's disability] is simply one of normal sensitivity and emotional
2 make-up.
3
4

5 **Comment**
6

7 This instruction can be used if the court wishes to provide a more detailed instruction on what
8 constitutes a hostile work environment than those set forth in Instructions 9.1.4 and 9.1.5. This
9 instruction is substantively identical to the definition of hostile work environment in Title VII cases.
10 See Instruction 5.2.1.

9.2.4 ADA Definitions — Constructive Discharge

Model

In this case, to show that [he/she] was subjected to an adverse “tangible employment action,” [plaintiff] claims that [he/she] was forced to resign due to conduct that discriminated against [him/her] on the basis of [plaintiff’s] disability. Such a forced resignation, if proven, is called a “constructive discharge.” To prove that [he/she] was subjected to a constructive discharge, [plaintiff] must prove that working conditions became so intolerable that a reasonable person in the employee’s position would have felt compelled to resign.

Comment

This instruction is substantively identical to the constructive discharge instruction for Title VII actions. See Instruction 5.2.2. *See also Spencer v. Wal-Mart Stores, Inc.*, 469 F.3d 311, 316 & n.4 (3d Cir. 2006) (discussing constructive discharge in the context of ADA claims).

This instruction can be used when the plaintiff was not fired but resigned, and claims that she nonetheless suffered an adverse employment action because she was constructively discharged due to an adverse action or actions that were sanctioned by her employer. This instruction is designed for integration into Instruction 9.1.4 (with respect to the instruction’s eighth element). If, instead, the plaintiff claims that she was constructively discharged based on a supervisor’s or co-worker’s adverse action or actions that were not sanctioned by the employer, the constructive discharge would not count as a tangible adverse employment action (for the purposes of determining whether the employer may assert an *Ellerth / Faragher* affirmative defense). *See* Comment 9.1.5. *See also Pennsylvania State Police v. Suders*, 542 U.S. 129, 140-41 (2004) (“[A]n employer does not have recourse to the *Ellerth/ Faragher* affirmative defense when a supervisor’s official act precipitates the constructive discharge; absent such a ‘tangible employment action,’ however, the defense is available to the employer whose supervisors are charged with harassment.”).

9.3.1 ADA Defenses — Direct Threat

In this case, [defendant] claims that it [describe employment action] [plaintiff] because [plaintiff] would have created a significant risk of substantial harm to [plaintiff] [others in the workplace].

Your verdict must be for [defendant] if [defendant] has proved both of the following by a preponderance of the evidence:

First: [Defendant] [specify actions taken with respect to plaintiff] because [plaintiff] posed a direct threat to the health or safety of [plaintiff] [others in the workplace]; and

Second: This direct threat could not be eliminated by providing a reasonable accommodation, as I have previously defined that term for you.

A direct threat means a significant risk of substantial harm to the health or safety of the person or other persons that cannot be eliminated by reasonable accommodation. The determination that a direct threat exists must have been based on a specific personal assessment of [plaintiff's] ability to safely perform the essential functions of the job. This assessment of [plaintiff's] ability must have been based on either a reasonable medical judgment that relied on the most current medical knowledge, or on the best available objective evidence.

In determining whether [plaintiff] would have created a significant risk of substantial harm, you should consider the following factors:

- 1) How long any risk would have lasted;
- 2) The nature of the potential harm and how severe the harm would be if it occurred;
- 3) The likelihood the harm would have occurred; and
- 4) Whether the harm would be likely to recur.

Comment

The ADA provides an affirmative defense where accommodation of, hiring or retaining an employee would constitute a “direct threat.” 42 U.S.C. § 12113(b). “Direct threat” is defined as “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.” 42 U.S.C. § 12111(3). The regulations extend this definition to include a direct threat to the health or safety of the plaintiff as well. In *Chevron U.S.A., Inc., v. Echazabal*, 536 U.S. 73, 79 (2002), the Court upheld those regulations and held that the “direct threat” defense applied to a direct threat of harm to the plaintiff as well as to others. The Court specifically noted that direct

1 threat is an “affirmative defense” to the ADA qualification standards. Thus a plaintiff does not have
2 the burden of proving that she did not pose a direct threat to the health and safety of herself or others
3 in the workplace.

9.4.1 ADA Damages – Compensatory Damages — General Instruction

Model

I am now going to instruct you on damages. Just because I am instructing you on how to award damages does not mean that I have any opinion on whether or not [defendant] should be held liable.

If you find by a preponderance of the evidence that [defendant] violated [plaintiff's] rights under the ADA by [describe conduct], then you must consider the issue of compensatory damages. You must award [plaintiff] an amount that will fairly compensate [him/her] for any injury [he/she] actually sustained as a result of [defendant's] conduct. The damages that you award must be fair compensation, no more and no less. The award of compensatory damages is meant to put [plaintiff] in the position [he/she] would have occupied if the discrimination had not occurred. [Plaintiff] has the burden of proving damages by a preponderance of the evidence.

[Plaintiff] must show that the injury would not have occurred without [defendant's] act [or omission]. Plaintiff must also show that [defendant's] act [or omission] played a substantial part in bringing about the injury, and that the injury was either a direct result or a reasonably probable consequence of [defendant's] act [or omission]. This test — a substantial part in bringing about the injury — is to be distinguished from the test you must employ in determining whether [defendant's] actions [or omissions] were motivated by discrimination. In other words, even assuming that [defendant's] actions [or omissions] were motivated by discrimination, [plaintiff] is not entitled to damages for an injury unless [defendant's] discriminatory actions actually played a substantial part in bringing about that injury.

[There can be more than one cause of an injury. To find that [defendant's] act [or omission] caused [plaintiff's] injury, you need not find that [defendant's] act [or omission] was the nearest cause, either in time or space. However, if [plaintiff's] injury was caused by a later, independent event that intervened between [defendant's] act [or omission] and [plaintiff's] injury, [defendant] is not liable unless the injury was reasonably foreseeable by [defendant].]

In determining the amount of any damages that you decide to award, you should be guided by common sense. You must use sound judgment in fixing an award of damages, drawing reasonable inferences from the facts in evidence. You may not award damages based on sympathy, speculation, or guesswork.

You may award damages for any pain, suffering, inconvenience, mental anguish, or loss of enjoyment of life that [plaintiff] experienced as a consequence of [defendant's] [allegedly unlawful act or omission]. No evidence of the monetary value of such intangible things as pain and suffering has been, or need be, introduced into evidence. There is no exact standard for fixing the compensation to be awarded for these elements of damage. Any award you make should be fair in

1 light of the evidence presented at the trial.
2

3 I instruct you that in awarding compensatory damages, you are not to award damages for the
4 amount of wages that [plaintiff] would have earned, either in the past or in the future, if [he/she] had
5 continued in employment with [defendant]. These elements of recovery of wages that [plaintiff]
6 would have received from [defendant] are called “back pay” and “front pay”. [Under the applicable
7 law, the determination of “back pay” and “front pay” is for the court.] [“Back pay” and “front pay”
8 are to be awarded separately under instructions that I will soon give you, and any amounts for “back
9 pay” and “front pay” are to be entered separately on the verdict form.]
10

11 You may award damages for monetary losses that [plaintiff] may suffer in the future as a
12 result of [defendant’s] [allegedly unlawful act or omission]. [For example, you may award damages
13 for loss of earnings resulting from any harm to [plaintiff’s] reputation that was suffered as a result of
14 [defendant’s] [allegedly unlawful act or omission]. Where a victim of discrimination has been
15 terminated by an employer, and has sued that employer for discrimination, [he/she] may find it more
16 difficult to be employed in the future, or may have to take a job that pays less than if the act of
17 discrimination had not occurred. That element of damages is distinct from the amount of wages
18 [plaintiff] would have earned in the future from [defendant] if [he/she] had retained the job.]
19

20 As I instructed you previously, [plaintiff] has the burden of proving damages by a
21 preponderance of the evidence. But the law does not require that [plaintiff] prove the amount of
22 [his/her] losses with mathematical precision; it requires only as much definiteness and accuracy as
23 circumstances permit.
24

25 [You are instructed that [plaintiff] has a duty under the law to “mitigate” [his/her] damages--
26 that means that [plaintiff] must take advantage of any reasonable opportunity that may have existed
27 under the circumstances to reduce or minimize the loss or damage caused by [defendant]. It is
28 [defendant’s] burden to prove that [plaintiff] has failed to mitigate. So if [defendant] persuades you
29 by a preponderance of the evidence that [plaintiff] failed to take advantage of an opportunity that was
30 reasonably available to [him/her], then you must reduce the amount of [plaintiff’s] damages by the
31 amount that could have been reasonably obtained if [he/she] had taken advantage of such an
32 opportunity.]
33

34 [In assessing damages, you must not consider attorney fees or the costs of litigating this case.
35 Attorney fees and costs, if relevant at all, are for the court and not the jury to determine. Therefore,
36 attorney fees and costs should play no part in your calculation of any damages.]
37
38

39 **Comment**

40

41 ADA remedies are the same as provided in Title VII. The enforcement provision of the
42 ADA, 42 U.S.C. § 12117, specifically provides for the same recovery in ADA actions as in Title VII
43 actions: “The powers, remedies and procedures set forth in . . . [42 U.S.C. § 2000e-5, the Title VII

1 remedies provision] shall be the powers, remedies and procedures this title provides to . . . any
2 person alleging discrimination on the basis of disability in violation of any provision of this Act . . .
3 concerning employment.” Accordingly, this instruction on compensatory damages is substantively
4 identical to that provided for Title VII actions. See Instruction 5.4.1.

5
6 For a discussion of the standards applicable to an award of emotional distress damages under
7 the ADA, see *Gagliardo v. Connaught Laboratories, Inc.*, 311 F.3d 565, 573 (3d Cir. 2002) (“To
8 recover emotional damages a plaintiff must show a reasonable probability rather than a mere
9 possibility that damages due to emotional distress were in fact incurred as a result of an unlawful
10 act.”).

11
12 Back pay and front pay are equitable remedies that are to be distinguished from the
13 compensatory damages to be determined by the jury under Title VII and therefore under the ADA.
14 See the Comments to Instructions 5.4.3 -4. Compensatory damages may include lost future earnings
15 over and above the front pay award. For example, the plaintiff may recover the diminution in
16 expected earnings in all future jobs due to reputational or other injuries, independently of any front
17 pay award. See the Comment to Instruction 5.4.1 for a more complete discussion.

18
19 The pattern instruction contains bracketed material that would instruct the jury not to award
20 back pay or front pay. The jury may, however, enter an award of back pay and front pay as advisory,
21 or by consent of the parties. In those circumstances, the court should refer to instructions 9.4.3 for
22 back pay and 9.4.4 for front pay. In many cases it is commonplace for back pay issues to be
23 submitted to the jury. The court may think it prudent to consult with counsel on whether the issues of
24 back pay or front pay should be submitted to the jury (on either an advisory or stipulated basis) or are
25 to be left to the court’s determination without reference to the jury.

26
27 In *Gunby v. Pennsylvania Elec. Co.*, 840 F.2d 1108, 1121-22 (3d Cir.1988), the Court held
28 that under 42 U.S.C. § 1981 and Title VII, a plaintiff cannot recover pain and suffering damages
29 without first presenting evidence of actual injury. The court stated that “[t]he justifications that
30 support presumed damages in defamation cases do not apply in § 1981 and Title VII cases. Damages
31 do not follow of course in § 1981 and Title VII cases and are easier to prove when they do.” Because
32 ADA damages awards are subject to the same strictures applicable to Title VII, the limitations set
33 forth in *Gunby* apply to recovery of pain and suffering damages under the ADA as well.

34 35 *Damages in ADA Retaliation Cases*

36
37 At least one court in the Third Circuit has held that a plaintiff’s recovery for retaliation under
38 the ADA is limited to equitable relief. See *Sabbrese v. Lowe’s Home Centers, Inc.*, 320 F. Supp.2d
39 311, 331 (W.D.Pa. 2004). The *Sabbrese* court relied on the Seventh Circuit’s analysis in *Kramer v.*
40 *Banc of America Securities LLC*, 355 F.3d 961 (7th Cir. 2004). The Seventh Circuit parsed the 1991
41 Civil Rights Act and found that while it provided for damages in ADA discrimination and
42 accommodation cases, it made no similar provision for ADA retaliation cases. The Third Circuit has
43 not decided whether damages are available in ADA retaliation cases. See the discussion in the

1 Comment to Instruction 9.1.7.

2
3 *Attorney Fees and Costs*
4

5 There appears to be no uniform practice regarding the use of an instruction that warns the
6 jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d 652
7 (3d Cir. 2006), the district court gave the following instruction: “You are instructed that if plaintiff
8 wins on his claim, he may be entitled to an award of attorney fees and costs over and above what you
9 award as damages. It is my duty to decide whether to award attorney fees and costs, and if so, how
10 much. Therefore, attorney fees and costs should play no part in your calculation of any damages.” *Id.*
11 at 656-57. The Court of Appeals held that the plaintiff had not properly objected to the instruction,
12 and, reviewing for plain error, found none: “We need not and do not decide now whether a district
13 court commits error by informing a jury about the availability of attorney fees in an ADEA case.
14 Assuming *arguendo* that an error occurred, such error is not plain, for two reasons.” *Id.* at 657.
15 First, “it is not ‘obvious’ or ‘plain’ that an instruction directing the jury *not* to consider attorney fees”
16 is irrelevant or prejudicial; “it is at least arguable that a jury tasked with computing damages might,
17 absent information that the Court has discretion to award attorney fees at a later stage, seek to
18 compensate a sympathetic plaintiff for the expense of litigation.” *Id.* Second, it is implausible “that
19 the jury, in order to eliminate the chance that Collins might be awarded attorney fees, took the
20 disproportionate step of returning a verdict against him even though it believed he was the victim of
21 age discrimination, notwithstanding the District Court's clear instructions to the contrary.” *Id.*; *see*
22 *also id.* at 658 (distinguishing *Fisher v. City of Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and
23 *Brooks v. Cook*, 938 F.2d 1048, 1051 (9th Cir. 1991)).

9.4.2 ADA Damages — Punitive Damages

Model

[Plaintiff] claims the acts of [defendant] were done with malice or reckless indifference to the plaintiff's federally protected rights and that as a result there should be an award of what are called "punitive" damages. A jury may award punitive damages to punish a defendant, or to deter the defendant and others like the defendant from committing such conduct in the future. [Where appropriate, the jury may award punitive damages even if the plaintiff suffered no actual injury, and so received nominal rather than compensatory damages.]

An award of punitive damages is permissible in this case only if you find by a preponderance of the evidence that a management official of [defendant] personally acted with malice or reckless indifference to [plaintiff's] federally protected rights. An action is with malice if a person knows that it violates the federal law prohibiting discrimination and does it anyway. An action is with reckless indifference if taken with knowledge that it may violate the law.

[For use where the defendant raises a jury question on good-faith attempt to comply with the law:

But even if you make a finding that there has been an act of discrimination with malice or reckless disregard of [plaintiff's] federal rights, you cannot award punitive damages if [defendant] proves by a preponderance of the evidence that it made a good-faith attempt to comply with the law, by adopting policies and procedures designed to prevent unlawful discrimination such as that suffered by [plaintiff].]

An award of punitive damages is discretionary; that is, if you find that the legal requirements for punitive damages are satisfied [and that [defendant] has not proved that it made a good-faith attempt to comply with the law], then you may decide to award punitive damages, or you may decide not to award them. I will now discuss some considerations that should guide your exercise of this discretion.

If you have found the elements permitting punitive damages, as discussed in this instruction, then you should consider the purposes of punitive damages. The purposes of punitive damages are to punish a defendant for a malicious or reckless disregard of federal rights, or to deter a defendant and others like the defendant from doing similar things in the future, or both. Thus, you may consider whether to award punitive damages to punish [defendant]. You should also consider whether actual damages standing alone are sufficient to deter or prevent [defendant] from again performing any wrongful acts it may have performed. Finally, you should consider whether an award of punitive damages in this case is likely to deter others from performing wrongful acts similar to

1 those [defendant] may have committed.

2
3 If you decide to award punitive damages, then you should also consider the purposes of
4 punitive damages in deciding the amount of punitive damages to award. That is, in deciding the
5 amount of punitive damages, you should consider the degree to which [defendant] should be
6 punished for its wrongful conduct, and the degree to which an award of one sum or another will deter
7 [defendant] or others from committing similar wrongful acts in the future.

8
9 [The extent to which a particular amount of money will adequately punish a defendant, and
10 the extent to which a particular amount will adequately deter or prevent future misconduct, may
11 depend upon the defendant's financial resources. Therefore, if you find that punitive damages
12 should be awarded against [defendant], you may consider the financial resources of [defendant] in
13 fixing the amount of such damages.]

14 15 16 **Comment**

17
18 ADA remedies are the same as provided in Title VII. The enforcement provision of the
19 ADA, 42 U.S.C. § 12117 specifically provides for the same recovery in ADA actions as in Title VII
20 actions: "The powers, remedies and procedures set forth in . . . [42 U.S.C. § 2000e-5, the Title VII
21 remedies provision] shall be the powers, remedies and procedures this title provides to . . . any
22 person alleging discrimination on the basis of disability in violation of any provision of this Act . . .
23 concerning employment." Accordingly, this instruction on punitive damages is substantively
24 identical to that provided for Title VII actions. See Instruction 5.4.2.

25
26 42 U.S.C.A. § 1981a(b)(1) provides that "[a] complaining party may recover punitive
27 damages under this section [Title VII] against a respondent (other than a government, government
28 agency or political subdivision) if the complaining party demonstrates that the respondent engaged in
29 a discriminatory practice or discriminatory practices with malice or with reckless indifference to the
30 federally protected rights of an aggrieved individual." Punitive damages are available only in cases of
31 intentional discrimination, i.e., cases that do not rely on the disparate impact theory of
32 discrimination.

33
34 In *Kolstad v. American Dental Association*, 527 U.S. 526, 534-35 (1999), the Supreme Court
35 held that plaintiffs are not required to show egregious or outrageous discrimination in order to
36 recover punitive damages under Title VII. The Court read 42 U.S.C.A. § 1981a to mean, however,
37 that proof of intentional discrimination is not enough in itself to justify an award of punitive
38 damages, because the statute suggests a congressional intent to authorize punitive awards "in only a
39 subset of cases involving intentional discrimination." Therefore, "an employer must at least
40 discriminate in the face of a perceived risk that its actions will violate federal law to be liable in
41 punitive damages." *Kolstad*, 527 U.S. at 536. See also *Gagliardo v. Connaught Laboratories, Inc.*,
42 311 F.3d 565, 573 (3d Cir. 2002) ("Punitive damages are available under the ADA when 'the
43 complaining party demonstrates that the respondent engaged in a discriminatory practice . . . with

malice or with reckless indifference.’ 42 U.S.C. § 1981a(b)(1) (2000). These terms focus on the employer's state of mind and require that ‘an employer must at least discriminate in the face of a perceived risk that its actions will violate federal law.’”) (quoting *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 535-36 (1999)).

The *Kolstad* Court further held that an employer may be held liable for a punitive damage award for the intentionally discriminatory conduct of its employee only if the employee served the employer in a managerial capacity, committed the intentional discrimination at issue while acting in the scope of employment, and the employer did not engage in good faith efforts to comply with federal law. *Kolstad*, 527 U.S. at 545-46. In determining whether an employee is in a managerial capacity, a court should review the type of authority that the employer has given to the employee and the amount of discretion that the employee has in what is done and how it is accomplished. *Id.*, 527 U.S. at 543.

The Court in *Kolstad* established an employer's good faith as a defense to punitive damages, but it did not specify whether it was an affirmative defense or an element of the plaintiff's proof for punitive damages. The instruction sets out the employer's good faith attempt to comply with anti-discrimination law as an affirmative defense. The issue has not yet been decided in the Third Circuit, but the weight of authority in the other circuits establishes that the defendant has the burden of showing a good-faith attempt to comply with laws prohibiting discrimination. See *Medcalf v. Trustees of University of Pennsylvania*, 71 Fed. Appx. 924, 933 n.3 (3d Cir. 2003) (noting that “the Third Circuit has not addressed the issue of whether the good faith compliance standard set out in *Kolstad* is an affirmative defense for which the defendant bears the burden of proof, or whether the plaintiff must disprove the defendant's good faith compliance with Title VII by a preponderance of the evidence”; but also noting that. “[a] number of other circuits have determined that the defense is an affirmative one.”).

Punitive damages are subject to caps in ADA actions. See 42 U.S.C. § 1981a (b)(3). But 42 U.S.C. §1981a(c)(2) provides that the court shall not inform the jury of the statutory limitations on recovery of punitive damages.

The Supreme Court has imposed some due process limits on both the size of punitive damages awards and the process by which those awards are determined and reviewed. In performing the substantive due process review of the size of punitive awards, a court must consider three factors: “the degree of reprehensibility of” the defendant's conduct; “the disparity between the harm or potential harm suffered by” the plaintiff and the punitive award; and the difference between the punitive award “and the civil penalties authorized or imposed in comparable cases.” *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996).

For a complete discussion of the applicability of the *Gore* factors to a jury instruction on punitive damages, see the Comment to Instruction 4.8.3.

Damages in ADA Retaliation Cases

1
2 At least one court in the Third Circuit has held that a plaintiff's recovery for retaliation under
3 the ADA is limited to equitable relief. *See Sabbrese v. Lowe's Home Centers, Inc.*, 320 F. Supp.2d
4 311, 331 (W.D.Pa. 2004). The *Sabbrese* court relied on the Seventh Circuit's analysis in *Kramer v.*
5 *Banc of America Securities LLC*, 355 F.3d 961 (7th Cir. 2004). The Seventh Circuit parsed the 1991
6 Civil Rights Act and found that while it provided for damages in ADA discrimination and
7 accommodation cases, it made no similar provision for ADA retaliation cases. The Third Circuit has
8 not decided whether damages are available in ADA retaliation cases. See the discussion in the
9 Comment to Instruction 9.1.7.

9.4.3 ADA Damages – Back Pay— For Advisory or Stipulated Jury

Model

If you find that [defendant] has violated [plaintiff's] rights under the ADA, then you must determine the amount of damages that [defendant's] actions have caused [plaintiff]. [Plaintiff] has the burden of proving damages by a preponderance of the evidence.

You may award as actual damages an amount that reasonably compensates [plaintiff] for any lost wages and benefits, taking into consideration any increases in salary and benefits, including pension, that [plaintiff] would have received from [defendant] had [plaintiff] not been the subject of [defendant's conduct].

[[Alternative One –for use when plaintiff does not seek back pay from periods earlier than the date that the unlawful employment practice occurred within the charge filing period:] Back pay damages, if any, apply from the time [plaintiff] was [describe employment action] until the date of your verdict. [However, federal law limits a plaintiff's recovery for back pay to a maximum of a two year period before the plaintiff filed [his/her] discrimination charge with the Equal Employment Opportunity Commission. Therefore the back pay award in this case must be determined only for the period between [specify dates]].]

[[Alternative Two –for use when plaintiff alleging pay discrimination seeks back pay from periods earlier than the date that the unlawful employment practice occurred within the charge filing period but starting two years or less before the filing of the charge:] In this case, [plaintiff] claims that [defendant] intentionally discriminated against [plaintiff] in [describe employment action] [plaintiff] on [date within the charge filing period]. [Plaintiff] also claims that [defendant] committed a similar or related unlawful employment practice with regard to discrimination in compensation on [date outside charge filing period but two years or less before the filing of the charge (hereafter "prior date")]. If you find that [defendant] intentionally discriminated against [plaintiff] in [describe employment action] on [date within the charge filing period], and that [defendant] committed unlawful pay discrimination with respect to [plaintiff] on [prior date], and that the unlawful employment practice, if any, on [prior date] was similar or related to [defendant's] [describe employment action] on [date within the charge filing period], then back pay damages, if any, apply from [prior date] until the date of your verdict. If you find that [defendant] intentionally discriminated against [plaintiff] in [describe employment action] on [date within the charge filing period], but you do not find that [defendant] committed a similar or related unlawful employment practice with regard to discrimination in compensation on [prior date], then back pay damages, if any, apply from [date within the charge filing period] until the date of your verdict.]

[[Alternative Three –for use when plaintiff alleging pay discrimination seeks back pay from periods earlier than the date that the unlawful employment practice occurred within the charge filing period based on an act more than two years before the filing of the charge:] In this

1 case, [plaintiff] claims that [defendant] intentionally discriminated against [plaintiff] in [describe
2 employment action] [plaintiff] on [date within the charge filing period]. [Plaintiff] also claims that
3 [defendant] committed a similar or related unlawful employment practice with regard to
4 discrimination in compensation on [date outside charge filing period and more than two years before
5 the filing of the charge (hereafter "prior date")]. If you find that [defendant] intentionally
6 discriminated against [plaintiff] in [describe employment action] on [date within the charge filing
7 period], and that [defendant] committed unlawful pay discrimination with respect to [plaintiff] on
8 [prior date], and that the unlawful employment practice, if any, on [prior date] was similar or related
9 to [defendant's] [describe employment action] on [date within the charge filing period], then back
10 pay damages, if any, apply from [date two years prior to filing date of charge (hereafter "two-year
11 date")] until the date of your verdict. In that case, back pay applies from [two-year date] rather than
12 [prior date] because federal law limits a plaintiff's recovery for back pay to a maximum of a two year
13 period before the plaintiff filed [his/her] discrimination charge with the Equal Employment
14 Opportunity Commission. If you find that [defendant] intentionally discriminated against [plaintiff]
15 in [describe employment action] on [date within the charge filing period], but you do not find that
16 [defendant] committed a similar or related unlawful employment practice with regard to
17 discrimination in compensation on [prior date], then back pay damages, if any, apply from [date
18 within the charge filing period] until the date of your verdict.]
19

20 You must reduce any award by the amount of the expenses that [plaintiff] would have
21 incurred in making those earnings.
22

23 If you award back pay, you are instructed to deduct from the back pay figure whatever wages
24 [plaintiff] has obtained from other employment during this period. However, please note that you
25 should not deduct social security benefits, unemployment compensation and pension benefits from
26 an award of back pay.
27

28 [You are further instructed that [plaintiff] has a duty to mitigate [his/her] damages--that is
29 [plaintiff] is required to make reasonable efforts under the circumstances to reduce [his/her]
30 damages. It is [defendant's] burden to prove that [plaintiff] has failed to mitigate. So if [defendant]
31 persuades you, by a preponderance of the evidence, that [plaintiff] failed to obtain substantially
32 equivalent job opportunities that were reasonably available to [him/ her], you must reduce the award
33 of damages by the amount of the wages that [plaintiff] reasonably would have earned if [he/she] had
34 obtained those opportunities.]
35
36

37 **[Add the following instruction if defendant claims "after-acquired evidence" of misconduct by**
38 **the plaintiff:**
39

40 [Defendant] contends that it would have made the same decision to [describe employment
41 decision] [plaintiff] because of conduct that it discovered after it made the employment decision.
42 Specifically, [defendant] claims that when it became aware of the [describe the after-discovered
43 misconduct], it would have made the decision at that point had it not been made previously.

1
2 If [defendant] proves by a preponderance of the evidence that it would have made the same
3 decision and would have [describe employment decision] [plaintiff] because of [describe after-
4 discovered evidence], you must limit any award of back pay to the date [defendant] would have
5 made the decision to [describe employment decision] [plaintiff] as a result of the after-acquired
6 information.]
7
8

9 **Comment**

10
11 ADA remedies are the same as provided in Title VII. The enforcement provision of the
12 ADA, 42 U.S.C. § 12117, specifically provides for the same recovery in ADA actions as in Title VII
13 actions: “The powers, remedies and procedures set forth in . . . [42 U.S.C. § 2000e-5, the Title VII
14 remedies provision] shall be the powers, remedies and procedures this title provides to . . . any
15 person alleging discrimination on the basis of disability in violation of any provision of this Act . . .
16 concerning employment.” Accordingly, this instruction on back pay is substantively identical to that
17 provided for Title VII actions. See Instruction 5.4.3.
18

19 An award of back pay is an equitable remedy; thus there is no right to jury trial on a claim for
20 back pay. See 42 U.S.C. §1981(b)(2) (“Compensatory damages awarded under this section shall not
21 include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of
22 the Civil Rights Act of 1964 [42 USCS § 2000e5(g)].”); 42 U.S.C. § 2000e-5(g)(1) (“If the court
23 finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful
24 employment practice charged in the complaint, the court may enjoin the respondent from engaging in
25 such unlawful employment practice, and order such affirmative action as may be appropriate, which
26 may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . .
27 or any other equitable relief as the court deems appropriate.”). *See also Spencer v. Wal-Mart Stores,*
28 *Inc.*, 469 F.3d 311, 316 (3d Cir. 2006) (relying on the statutory language of Title VII, which applies
29 to damages recovery under the ADA, the court holds in an ADA action that “back pay remains an
30 equitable remedy to be awarded within the discretion of the court”). “[A] district court may, pursuant
31 to its broad equitable powers granted by the ADA, award a prevailing employee an additional sum of
32 money to compensate for the increased tax burden a back pay award may create.” *Eshelman v. Agere*
33 *Systems, Inc.*, 554 F.3d 426, 441-42 (3d Cir. 2009).
34

35 An instruction on back pay is nonetheless included because the parties or the court may wish
36 to empanel an advisory jury—especially given the fact that in most cases the plaintiff will be seeking
37 compensatory damages and the jury will be sitting anyway. See Fed. R.Civ.P. 39(c). Alternatively,
38 the parties may agree to a jury determination on back pay, in which case this instruction would also
39 be appropriate. In many cases it is commonplace for back pay issues to be submitted to the jury. The
40 court may think it prudent to consult with counsel on whether the issues of back pay or front pay
41 should be submitted to the jury (on either an advisory or stipulated basis) or are to be left to the
42 court’s determination without reference to the jury. Instruction 5.4.1, on compensatory damages,
43 instructs the jury in such cases to provide separate awards for compensatory damages, back pay, and

1 front pay.

2
3 The appropriate standard for measuring a back pay award is “to take the difference between
4 the actual wages earned and the wages the individual would have earned in the position that, but for
5 discrimination, the individual would have attained.” *Gunby v. Pennsylvania Elec. Co.*, 840 F.2d
6 1108, 1119-20 (3d Cir. 1988).

7
8 42 U.S.C. § 2000e-5(g)(1) provides that “[b]ack pay liability shall not accrue from a date
9 more than two years prior to the filing of a charge with the Commission.” The court of appeals has
10 explained that “[t]his constitutes a limit on liability, not a statute of limitations, and has been
11 interpreted as a cap on the amount of back pay that may be awarded under Title VII.” *Bereda v.*
12 *Pickering Creek Indus. Park, Inc.*, 865 F.2d 49, 54 (3d Cir. 1989). The *Bereda* court held that it was
13 plain error to fail to instruct the jury on an analogous cap under Pennsylvania law (which set the
14 relevant limit under the circumstances of the case). *See id.* Accordingly, when the facts of the case
15 make Section 2000e-5's cap relevant, the court should instruct the jury on it.

16
17 Section 2000e-5's current framework for computing a back pay award for Title VII pay
18 discrimination claims reflects Congress's response to the Supreme Court's decision in *Ledbetter v.*
19 *Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007). The effect of the Lilly Ledbetter Fair Pay
20 Act of 2009 (LLFPA), Pub. L. No. 111-2, § 2, January 29, 2009, 123 Stat. 5, which amended 42
21 U.S.C. § 2000e-5(e), is discussed in Comment 5.4.3.

22
23 In *Craig v. Y & Y Snacks, Inc.*, 721 F.2d 77, 82 (3d Cir. 1983), the court held that
24 unemployment benefits should not be deducted from a back pay award. That holding is reflected in
25 the instruction.

26
27 In *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 362 (1995), the Court held
28 that if an employer discharges an employee for a discriminatory reason, later-discovered evidence
29 that the employer could have used to discharge the employee for a legitimate reason does not
30 immunize the employer from liability. However, the employer in such a circumstance does not have
31 to offer reinstatement or front pay and only has to provide back pay "from the date of the unlawful
32 discharge to the date the new information was discovered." 513 U.S. at 362. See also *Mardell v.*
33 *Harleysville Life Ins. Co.*, 65 F.3d 1072, 1073 (3d Cir. 1995) (stating that “after-acquired evidence
34 may be used to limit the remedies available to a plaintiff where the employer can first establish that
35 the wrongdoing was of such severity that the employee in fact would have been terminated on those
36 grounds alone if the employer had known of it at the time of the discharge.”). Both *McKennon* and
37 *Mardell* observe that the defendant has the burden of showing that it would have made the same
38 employment decision when it became aware of the post-decision evidence of the employee's
39 misconduct.

9.4.4 ADA Damages – Front Pay – For Advisory or Stipulated Jury

Model

You may determine separately a monetary amount equal to the present value of any future wages and benefits that [plaintiff] would reasonably have earned from [defendant] had [plaintiff] not [describe adverse employment action] for the period from the date of your verdict through a reasonable period of time in the future. From this figure you must subtract the amount of earnings and benefits [plaintiff] will receive from other employment during that time. [Plaintiff] has the burden of proving these damages by a preponderance of the evidence.

[If you find that [plaintiff] is entitled to recovery of future earnings from [defendant], then you must reduce any award by the amount of the expenses that [plaintiff] would have incurred in making those earnings.]

You must also reduce any award to its present value by considering the interest that [plaintiff] could earn on the amount of the award if [he/she] made a relatively risk-free investment. The reason you must make this reduction is because an award of an amount representing future loss of earnings is more valuable to [plaintiff] if [he/she] receives it today than if it were received at the time in the future when it would have been earned. It is more valuable because [plaintiff] can earn interest on it for the period of time between the date of the award and the date [he/she] would have earned the money. Thus you should decrease the amount of any award for loss of future earnings by the amount of interest that [plaintiff] can earn on that amount in the future.

[Add the following instruction if defendant claims “after-acquired evidence” of misconduct by the plaintiff:

[Defendant] contends that it would have made the same decision to [describe employment decision] [plaintiff] because of conduct that it discovered after it made the employment decision. Specifically, [defendant] claims that when it became aware of the [describe the after-discovered misconduct], it would have made the decision at that point had it not been made previously.

If [defendant] proves by a preponderance of the evidence that it would have made the same decision and would have [describe employment decision] [plaintiff] because of [describe after-discovered evidence], then you may not award [plaintiff] any amount for wages that would have been received from [defendant] in the future.]

Comment

ADA remedies are the same as provided in Title VII. The enforcement provision of the

1 ADA, 42 U.S.C. § 12117, specifically provides for the same recovery in ADA actions as in Title VII
2 actions: “The powers, remedies and procedures set forth in . . . [42 U.S.C. § 2000e-5, the Title VII
3 remedies provision] shall be the powers, remedies and procedures this title provides to . . . any
4 person alleging discrimination on the basis of disability in violation of any provision of this Act . . .
5 concerning employment.” Accordingly, this instruction on front pay is substantively identical to that
6 provided for Title VII actions. See Instruction 5.4.4.

7
8 There is no right to jury trial under Title VII (or by extension the ADA) for a claim for front
9 pay. See *Pollard v. E. I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001) (holding that front pay
10 under Title VII is not an element of compensatory damages). See also *Marinelli v. City of Erie*, 25 F.
11 Supp.2d 674, 675 (W.D.Pa. 1998) (“The ADA provides for all remedies available under Title VII,
12 which includes backpay and front pay or reinstatement. [Front pay relief] is equitable in nature, and
13 thus within the sound discretion of the trial court.”), *judgment vacated on other grounds*, 216 F.3d
14 354 (3d Cir. 2000).

15
16 An instruction on front pay is nonetheless included because the parties or the court may wish
17 to empanel an advisory jury—especially given the fact that in most cases the plaintiff will be seeking
18 compensatory damages and the jury will be sitting anyway. See Fed. R.Civ.P. 39(c). Alternatively,
19 the parties may agree to a jury determination on front pay, in which case this instruction would also
20 be appropriate. Instruction 9.4.1, on compensatory damages, instructs the jury in such cases to
21 provide separate awards for compensatory damages, back pay, and front pay.

22
23 Front pay is considered a remedy that substitutes for reinstatement, and is awarded when
24 reinstatement is not viable under the circumstances. See *Berndt v. Kaiser Aluminum & Chemical*
25 *Sales, Inc.*, 789 F.2d 253, 260-61 (3d Cir. 1986) (noting that “when circumstances prevent
26 reinstatement, front pay may be an alternate remedy”).

27
28 In *Monessen S.R. Co. v. Morgan*, 486 U.S. 330, 339 (1988), the Court held that “damages
29 awarded in suits governed by federal law should be reduced to present value.” (Citing *St. Louis*
30 *Southwestern R. Co. v. Dickerson*, 470 U.S. 409, 412 (1985)). The “self-evident” reason is that “a
31 given sum of money in hand is worth more than the like sum of money payable in the future.” The
32 Court concluded that a “failure to instruct the jury that present value is the proper measure of a
33 damages award is error.” *Id.* Accordingly, the instruction requires the jury to reduce the award of
34 front pay to present value. It should be noted that where damages are determined under state law, a
35 present value instruction may not be required under the law of certain states. See, e.g., *Kaczkowski v.*
36 *Bolubasz*, 491 Pa. 561, 421 A.2d 1027 (Pa. 1980) (advocating the “total offset” method, under which
37 no reduction is necessary to determine present value, as the value of future income streams is likely
38 to be offset by inflation).

9.4.5 ADA Damages — Nominal Damages

Model

If you return a verdict for [plaintiff], but [plaintiff] has failed to prove actual injury and therefore is not entitled to compensatory damages, then you must award nominal damages of \$ 1.00.

A person whose federal rights were violated is entitled to a recognition of that violation, even if [he/she] suffered no actual injury. Nominal damages (of \$1.00) are designed to acknowledge the deprivation of a federal right, even where no actual injury occurred.

However, if you find actual injury, you must award compensatory damages (as I instructed you), rather than nominal damages.

Comment

ADA remedies are the same as provided in Title VII. The enforcement provision of the ADA, 42 U.S.C. § 12117, specifically provides for the same recovery in ADA actions as in Title VII actions: “The powers, remedies and procedures set forth in . . . [42 U.S.C. § 2000e-5, the Title VII remedies provision] shall be the powers, remedies and procedures this title provides to . . . any person alleging discrimination on the basis of disability in violation of any provision of this Act . . . concerning employment.” Accordingly, this instruction on nominal damages is substantively identical to that provided for Title VII actions. See Instruction 5.4.5.

An instruction on nominal damages is proper when the plaintiff has failed to present evidence of actual injury. However, when the plaintiff has presented evidence of actual injury and that evidence is undisputed, it is error to instruct the jury on nominal damages, at least if the nominal damages instruction is emphasized to the exclusion of appropriate instructions on compensatory damages. Thus, in *Pryer v. C.O. 3 Slavic*, 251 F.3d 448, 452 (3d Cir. 2001), the district court granted a new trial, based partly on the ground that because the plaintiff had presented “undisputed proof of actual injury, an instruction on nominal damages was inappropriate.” In upholding the grant of a new trial, the Court of Appeals noted that “nominal damages may only be awarded in the absence of proof of actual injury.” *See id.* at 453. The court observed that the district court had “recognized that he had erroneously instructed the jury on nominal damages and failed to inform it of the availability of compensatory damages for pain and suffering.” *Id.* Accordingly, the court held that “[t]he court’s error in failing to instruct as to the availability of damages for such intangible harms, coupled with its emphasis on nominal damages, rendered the totality of the instructions confusing and misleading.” *Id.* at 454.

Nominal damages may not exceed one dollar. *See Mayberry v. Robinson*, 427 F. Supp. 297, 314 (M.D.Pa.1977) (“It is clear that the rule of law in the Third Circuit is that nominal damages may

1 not exceed \$1.00.") (citing *United States ex rel. Tyrrell v. Speaker*, 535 F.2d 823, 830 (3d Cir.1976)).